United Nations A/72/286

General Assembly

Distr.: General
4 August 2017

Original: English

Seventy-second session
Item 72 of the provisional agenda*
Right of peoples to self-determination

Use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly, in accordance with Commission on Human Rights resolution 2005/2 and Human Rights Council resolution 33/4, the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

* A/72/150.

17-13393 (E) 300817

Please recycle

Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Summary

The present report is submitted pursuant to the mandate of the Working Group, which is to monitor the phenomenon of mercenaries, mercenary-related activities and the activities of private military and security companies and their impact on human rights. In its resolution 33/4, the Human Rights Council emphasized utmost concern regarding the impact of the activities of private military and security companies on the enjoyment of human rights, in particular when, inter alia, operating in privatized prisons and immigration-related detention facilities. In that resolution, the Council noted that such companies and their personnel were rarely held accountable for violations of human rights, particularly the right to self-determination. In this connection, the Working Group focuses the present report on the use of private security companies in places of deprivation of liberty, with attention given to the resulting impact on human rights. The Working Group highlights that the profit motives of private security operators often override human rights considerations, leading to situations in which human rights violations are likely to be committed with impunity against those deprived of their liberty, with little or no recourse to effective remedies for victims.

Contents

Chapter		*Page*
I.	Introduction	3
II.	International legal framework	4
III.	Inherent State functions and the growth of privatization	6
IV.	Human rights costs of privatization of deprivation of liberty	7
	A. Private versus public prison facilities	8
	B. Immigration-related detention	11
V.	Challenges for accountability and remedies	17
VI.	Conclusions and recommendations	18

I. Introduction

1. The present report is submitted in accordance with General Assembly resolution 71/182 and Human Rights Council resolution 33/4. The report is linked to the mandate of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. That mandate was established to monitor the phenomenon of mercenaries, mercenary-related activities and the activities of private military and security companies and their impact on human rights. In its resolution 33/4, the Human Rights Council emphasized its utmost concern about the impact of the activities of private military and security companies on the enjoyment of human rights, in particular when, inter alia, operating in privatized prisons and immigration-related detention facilities. In that resolution, the Council further noted that such companies and their personnel were rarely held accountable for violations of human rights. In this connection, the Working Group decided to focus the present report on the use of private security companies in places of deprivation of liberty, with attention given to the resulting impact on human rights.

2. Since its establishment, the Working Group has focused extensively on, inter alia, the need for robust regulation of private military and security companies, with particular emphasis on ensuring accountability for human rights violations committed by company personnel. The Working Group's decision to assess the privatization of places of deprivation of liberty and the resulting impact on human rights was also based on recognition of regulatory gaps in national legislation relating to private military and security companies and thus of the risk of impunity for human rights violations committed by company personnel.

3. The Working Group has defined a private military and security company as "a corporate entity which provides, on a compensatory basis, military and/or security services by physical persons and/or legal entities". For the present report, the Working Group focuses particularly on for-profit private security companies operating in prisons and detention facilities for migrants. The Working Group generally defines security services to include "armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities". Military services refer to "specialized services related to military actions, including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities".

4. In preparing the report, the Working Group sent out questionnaires to States, civil society organizations and relevant stakeholders to request information on the use of private security companies[1] in places of deprivation of liberty. In the questionnaire, the Working Group requested information, inter alia, on whether States were: "home States", where private security companies are registered or incorporated or where the management of such companies is primarily carried out;

[1] The report generally refers to "private security companies" rather than private military and security companies in the light of the large number of Member States that informed the Working Group that they did not have private military and security companies. Nevertheless, the Working Group has stressed that private security companies often carry out functions that can be deemed "military" and therefore can be considered private military and security companies. Some of the companies operating prisons and detention centres can fall into the category of private military and security companies by virtue of the types of services they provide in various operations around the world.

"contracting States" that directly contract the services of private security companies, including from private security companies that subcontract to other private security companies; or "territorial States", where private security companies operate, in relation to privatized prison and detention facilities. Several States responded to the questionnaires mostly by stating that they did not privatize places of deprivation of liberty. Civil society organizations working on issues related to prisons and detention provided important and useful information to the Working Group.

5. On 27 April 2017, the Working Group convened a public panel event and a private expert consultation with States and civil society organizations to discuss the subject of the present report. Representatives of more than 50 States participated in the panel event, along with representatives of civil society organizations, and mainly discussed the human rights challenges and risks of outsourcing prisons and detention facilities to private security contractors, and the measures required to ensure respect for the human rights of persons deprived of their liberty. The information obtained from the questionnaires, panel event and expert consultation contributed to the findings of the Working Group.

6. In the present report, the Working Group notes the necessity of distinguishing between, on the one hand, private companies that provide services such as medical services, food, and educational and vocational training to those held in places of deprivation of liberty and, on the other hand, those responsible for the operation of the facility itself. In some situations, the State authority operates a prison or detention facility by itself or in partnership with a private company.

7. As part of its work on assessing the regulation of private military and security companies, the Working Group undertook a global study over the past four years on national legislation relating to such companies. It has reviewed 60 countries in all regions,[2] and the findings have shown that national regulation of the private military and security industry is inconsistent. Further, robust safeguards against potential human rights violations by company personnel are lacking. The study showed worrying trends relating to significant gaps in penal accountability and civil liability of individuals and corporate actors engaged in the private military and security business. Given the likelihood of private military and security company personnel engaging in the use of force and being involved in hostilities, these gaps underscore real risks to human rights.

II. International legal framework

8. The rights of persons deprived of liberty are a special concern of international human rights law. The manner in which the State treats vulnerable members of society in its prisons and detention facilities has long been an issue that determines a State's compliance with its international human rights obligations.[3] Human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the United Nations Standard Minimum Rules for the Treatment of Prisoners, provide human rights guarantees concerning deprivation of liberty. Article 10 of the International Covenant on Civil and Political Rights, for instance, states that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Persons deprived of their liberty are also protected against torture or other cruel, inhuman or degrading treatment or

[2] See A/HRC/24/45, A/HRC/27/50, A/HRC/30/34 and A/HRC/33/43.

[3] Adam McBeth, "Privatising human rights: what happens to the State's human rights duties when services are privatized?", *Melbourne Journal of International Law*, vol. 5, No. 1 (2004).

punishment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[4]

9. The Basic Principles for the Treatment of Prisoners also reaffirm the fundamental human rights accorded to persons deprived of liberty by declaring that "except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants". These fundamental human rights and freedoms include the rights to life; freedom of thought, conscience and religion; health; freedom from slavery; and physical and mental integrity of persons deprived of their liberty. The Human Rights Committee, in its general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, clarified that States had a positive obligation toward persons who were particularly vulnerable because of their status as persons deprived of liberty. As such, treating all persons deprived of their liberty with humanity and with respect for their dignity was a fundamental and universally applicable rule. That rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

10. Human Rights Committee general comment 21 provides ample reference to various international standards applicable to the treatment of prisoners and detainees, be it in prisons, detention camps, correctional institutions or elsewhere.

11. Although the State ultimately has the obligation to respect, protect and promote the realization of human rights, there has also been growing support and acceptance by the international community of the principle that non-State actors, including business entities, must respect international human rights standards and obligations. International frameworks focused on the duties of States in respect of private operators, and comments and decisions by the Human Rights Committee and treaty monitoring bodies, are among efforts to extend the influence of international human rights law to non-State actors via the State. With regard to privatizing prisons, the Human Rights Committee clarified that the obligations of States in relation to the rights of prisoners extend to privately run institutions. The Committee expressed concern about the privatization of prisons and related services and the consequences for the ability of States to meet their human rights obligations.[5] Thus, in the case of privatized services, the State has a heightened duty of supervision, ensuring that private entities meet their obligations.[4] Further, the State is required to monitor privatized prisons and to intervene whenever necessary to protect the human rights of those deprived of their liberty, irrespective of the private operator's obligations.

12. The responsibility of corporations to respect human rights in their operations and business relationships is now a widely accepted concept. The Guiding Principles for Business and Human Rights[6] recognize both the existing obligations of States to respect, protect and fulfil human rights obligations, and the obligation of business entities to comply with and respect human rights standards in carrying out their operations.

[4] United Nations, *Treaty Series*, vol. 1465, No. 24841.

[5] See CCPR/CO/75/NZL and CCPR/C/79/Add.55.

[6] Available from www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

III. Inherent State functions and the growth of privatization

13. State outsourcing of social services has become a norm worldwide. Privatized prisons and detention facilities are now an international multibillion dollar industry involving private security companies that operate both domestically and transnationally. Human rights experts and civil society organizations have regularly expressed concerns regarding the outsourcing of inherent State functions, including prisons and detention facilities.

14. Case law has also been adopted against the privatization of prisons. The Supreme Court of Israel ruled against prison privatization in 2009, when it annulled a law that would have authorized the establishment of the country's first privatized prison. The Court held that the execution of governmental powers by prison staff employed by a for-profit organization violated prisoners' basic rights to liberty and human dignity.[7] The case against privatization was founded on the argument that a private entity employing governmental powers posed an unavoidable risk of an unjustified use of force and that the very culture of for-profit organizations created a risk of an abuse of power. The Court further stated that a person who was detained must not be subject to the use of coercive measures by employees of a private, for-profit corporation. The decision by the Supreme Court of Israel reflects the concerns that many have expressed about privatized prisons and detention facilities.

15. The privatized prison and detention industry nevertheless continues to grow, particularly in middle- to high-income countries.[8] In this regard, the Working Group received information concerning private security companies linked to the following countries, which are either home States, territorial States or contracting States: Australia, Austria, France, Nauru, Netherlands, New Zealand, Papua New Guinea, South Africa, Spain, United States of America and United Kingdom of Great Britain and Northern Ireland.[9]

16. Much of the information received by the Working Group referred to the situation in the United States, given the high rate of incarceration and the tremendous growth of private contractors in the prison industry in that country in the past 30 years. Three companies dominate the privatized prison industry in the United States: the Corrections Corporations of America, now known as CoreCivic; the Geo Group; and Management and Training Corporation. CoreCivic operates primarily in the United States, while the other two companies have transnational operations. In Europe, meanwhile, the companies G4S and Serco operate in places of deprivation of liberty, according to information received by the Working Group.

17. The Working Group notes that the privatization of prisons and immigration detention facilities is not limited to the countries mentioned above and private security companies. The human rights challenges presented by the privatization of prisons and detention facilities are an issue of global concern and are not limited to the countries and companies identified in the present report.

18. In the privatized prison sphere, policies that have resulted in a greater use of incarceration have increased support for the use of private security companies.

[7] Barak Medina, "Constitutional limits to privatization: the Israeli Supreme Court decision to invalidate prison privatization", *International Journal of Constitutional Law*, vol. 8, No. 4 (October 2010).

[8] Rob Allen, Director, Justice and Prisons, statement to the Working Group on the use of mercenaries panel on private military and security companies in places of deprivation of liberty and their impact on human rights (Geneva, April 2017).

[9] Michael Flynn, Director, Global Detention Project, statement to the Working Group on the use of mercenaries panel on private military and security companies in places of deprivation of liberty and their impact on human rights (Geneva, April 2017).

External corporate pressures ensure that private security companies running prisons and detention facilities are kept in operation and, more importantly, that there is a consistent, and even increasing, demand for their existence.

19. The following factors have contributed to the growth in privatization:[10] (a) an increase in the prison population, owing to changes in sentencing policy, such as the imposition of minimum sentences, the requirement that more time to be served before parole, and the rise of mass incarceration; (b) increased lobbying efforts by private companies, with the aim of obtaining more State contracts for privatized prisons and detention facilities; (c) overcrowding and the reluctance of States to allocate the funds needed to build new prisons; (d) an increase in the detention of irregular migrants; and (e) perceived need in times of crisis.

Privatized services

20. Privatization can involve a for-profit entity fully operating a prison or detention facility or a private company providing services to a State-operated facility. Some of these services include rehabilitative programmes and health, medical and educational services. The outsourcing of these subsidiary functions to private companies can also be challenging. For example, the outsourcing of prison telephone services can lead to prisoners or detainees paying grossly inflated rates as compared with average rates outside of prison. Privatized services thus need to be scrutinized to ensure that they are not exploitative.

21. Most human rights concerns in the privatization sphere, however, are linked to the enormous responsibility, discretion and power given to private security companies, which may lead to abuse in the use of force against prisoners and detainees. Some companies have the discretion, for instance, to make decisions that include lengthening a person's detention as punishment for committing infractions or transferring a detainee to solitary confinement for a duration of time determined by company personnel.[11] The Working Group noted that, in situations in which a privatized prison or detention facility was wholly or principally operated by a private security company, there were greater reasons for concern regarding human rights violations owing to the extent of control the company had over both the facility and detainees, as well as the lack of transparency and access to grievance mechanisms in such facilities.

IV. Human rights costs of privatization of deprivation of liberty

22. In the privatization context, States often attempt to meet their human rights obligations through the use of contractual conditions relating to the treatment of prisoners. In many cases, however, the contractual obligations of privatized prison operators are not aligned with internationally recognized human rights standards. When contractual obligations take into account international human rights standards, the implementation of these standards is often weak or absent. Human rights experts have expressed concern that "the profit motive of privately operated prisons ... has fostered a situation in which the rights and needs of prisoners and the direct responsibility of States for those they deprive of their freedom are diminished

[10] Ibid.; see also Carl Takei, staff attorney, American Civil Liberties Union, statement to the Working Group on the use of mercenaries panel on private military and security companies in places of deprivation of liberty and their impact on human rights (Geneva, April 2017).

[11] Jane Andrew, "Prisons, the profit motive and other challenges to accountability", Working Paper Series (New South Wales, Australia, University of Wollongong, 2006); and statements provided by civil society actors to the Working Group through the questionnaire.

in the name of greater efficiency".[12] Reports of frequent and serious human rights violations committed by private security companies and their personnel also suggest the absence of necessary and effective grievance mechanisms, accountability and remedies for human rights abuses.

A. Private versus public prison facilities

23. Human rights violations and abuses are not unique or specific to the privatized prison context. There is agreement, however, among several stakeholders that the very nature of the private sector in general, and privatized prison companies in particular, further increases the risk of human rights abuses and violations.[8] While operational difficulties and bad practices are not limited to privately run prisons, there are growing concerns about whether the need to make a profit pushes private companies to propose unrealistic bids in order to win contracts and to cut corners in delivering on them. A World Bank paper noted that there might be significant additional risks attached to privatized prisons in countries where robust legislative and regulatory frameworks were less developed or the application of such frameworks was weak.[13]

24. Some of the arguments against for-profit operations in privatized prisons and detention facilities highlighted the objective of such companies of cutting costs, leading to a decline in the quality or standard of services. Further, in some countries, people held in privatized prisons served longer terms of incarceration in comparison with in public facilities, owing to differences in how privatized prisons issued conduct violations to prisoners.[10] In 2016, the Deputy Attorney General of the United States, in a memo[14] to the acting director of the Federal Bureau of Prisons, noted that privatized prisons compared poorly with publicly operated facilities. They did not provide the same level of services, programmes and resources, did not save substantially on costs and did not maintain the same level of safety and security. Rehabilitative programmes, educational programmes and job training provided by the State, which were essential to reducing recidivism and improving public safety, were hard to replicate and outsource. The memo clarified the intention of the Government of the United States to reduce reliance on privatized prison operations. This position has since changed under the new Administration. Nevertheless, the Department of Justice memo highlighted some valid ongoing concerns regarding privatized prisons when compared with public prison facilities.

1. Profit motive: heightened risk of human rights violations

25. The financial incentives inherent in privatization undoubtedly risk economies being achieved through reductions in service, the number and quality of staff and the maintenance of physical infrastructure. The profit motive, efficiency concerns and a lack of accountability are some of the problematic realities of private operators that contribute to an increased risk of human rights violations and abuses. They also feed into each other: for example, the potential for contract management to align the profit motive with fulfilment of human rights obligations is undermined by a lack of information and procedural accountability.

---

[12] *Capitalist Punishment: Prison Privatization and Human Rights*, Andrew Coyle, Allison Campbell and Rodney Neufeld, eds. (Atlanta, Clarity Press, and London, Zed Books, 2003), foreword.

[13] Rob Allen and Paul English, "Public-private partnerships in prison construction and management", Justice and Development Working Paper Series (Washington, D.C., World Bank, 2013).

[14] Available from www.justice.gov/archives/opa/file/886311/download.

26. Further concerns include a lack of transparency about what is happening in private security facilities. One of the criticisms of privatization is that companies are responsible to their shareholders, not to the public, and thus have little incentive to provide public information about their treatment of prisoners. Some privatized prisons have had violent incidents that were not recorded or were recorded as being less serious than they actually were. If prisons are financially penalized for such incidents, there is an incentive to underrecord them.[8]

27. Research suggests that there may be a financial incentive for the operators of privatized prisons to maximize the number of days served for each prisoner.[15] It found that inmates in privatized prisons were cited for twice as many conduct infractions as those in public prisons, resulting in longer stays.

28. Some private security companies contracting for privatized prisons with the State impose "occupancy guarantees", sometimes referred to as "lock-up quotas," which require the Government to either provide a certain number of prisoners on a daily basis or pay as though the empty prison beds were filled.[16] A 2015 report by In the Public Interest, a non-governmental organization, reviewed the contracts for 62 state- and county-level privatized prisons and jails in the United States and found that 41 (65 per cent of the total) contained a minimum occupancy guarantee. Those guarantees ranged from 80 to 100 per cent of capacity, with many around 90 per cent.[17] Occupancy guarantees improperly incentivize incarceration and discourage government officials from pursuing alternatives to detention and incarceration. The purpose of these guarantees is to protect the profit margins of private security and prison companies. They can also prevent private companies from suffering financial consequences for gross human rights violations. An example of this occurred in the United States, where state officials allegedly transferred around 138 prisoners out of a privatized prison in response to documented security failures. The privatized prison company used the 97 per cent occupancy guarantee in the contract to force the state to compensate the company for the empty beds, even though the beds had gone empty precisely because of the company's failure to manage the prison appropriately.[9]

29. The Working Group was also informed of situations in the United Kingdom concerning a private sector juvenile facility in which undercover cameras filmed abuse and its cover-up. Allegations included that the culture in the facility was "based on control and contract compliance rather than rehabilitation and safeguarding vulnerable young people".[18] Video footage of fight clubs in privatized prisons in New Zealand also led to the termination of a contract between the Government and an operator of privatized prisons.

30. Although human rights violations occur in public-run prisons and detention facilities, the mechanisms required to protect prisoners' human rights appear to be more robust in such facilities, likely owing to better control over the vetting and recruitment of personnel and more stringent grievance and complaint procedures. In short, there is less control that is founded in the rule of law when private operators are involved.

---

[15] Peter Kerwin, "Study finds private prisons keep inmates longer, without reducing future crime" (10 June 2015). Available from http://news.wisc.edu/study-finds-private-prisons-keep-inmates-longer-without-reducing-future-crime.

[16] Takei, "Private military and security companies in places of deprivation of liberty".

[17] In the Public Interest, "Criminal: how lockup quotas and 'low-crime taxes' guarantee profits for private prison corporations" (September 2013). Available from www.inthepublicinterest.org/wp-content/uploads/Criminal-Lockup-Quota-Report.pdf.

[18] Medway Improvement Board, "Final report of the Board's advice to Secretary of State for Justice" (30 March 2016).

31. Ensuring even the most basic, commonplace forms of accountability has been problematic in privatized prisons. There have been difficulties ensuring access to quality information; it has been hard to ensure financial accountability because of the ways that contract fees have been structured; it has been difficult to monitor contract performance; and the processes for awarding, renewing and terminating contracts have presented difficulties that undermine the ability of the community to ensure public accountability.[11]

32. Privatized prison companies are reported to have profited handsomely through contracts negotiated with State authorities and thus have sought to exercise significant influence in lobbying State authorities for additional contracts. In some States, there appear to be recurrent "revolving door" situations in which public corrections personnel have left their positions to become private security company employees, further highlighting concerns regarding the profit focus within the private security industry and its influence among policymakers and State officials.

33. The Working Group has been informed of the use of force by private security personnel against prisoners and detainees that has resulted in grave injuries; medical neglect that has led to deaths; inhuman and ill-treatment; sexual violence and abuse; failure to enable or permit contact with the family members of detainees; insufficient care services; the arbitrary use of solitary confinement; and the imposition of quasi-judicial decisions that affect the legal status and well-being of prisoners or detainees.

34. The vetting and training of staff is reported to be poor in many privatized prisons. The profit motive encourages: cost cutting by hiring lower-paid — and thus less qualified — staff, including individuals with a past history of inmate abuse;[19] failure to respond to prisoner health and medical needs; and higher rates of involvement in serious and violent incidents than in government-operated facilities. The profit motive has also affected the appropriate provision of good quality food and medical care and services related to the education and training of prisoners.

35. Labour programmes in privatized prisons have also been punitive and exploitative, rather than rehabilitative, as prisoners may be forced to engage in low-paid or unpaid work in poor conditions without any meaningful impact on their skills and education. Researchers have found that there is a heightened risk that labour programmes in privatized prisons could amount to inhumane exploitation. Reports have shown that, in privatized prisons, inmates earn wages that are well below the minimum wage, in comparison with those in State-operated prisons, where inmates generally (though not always) receive the minimum wage for their work.[20]

36. In certain crises around the world, such as in occupied territories, the use of private security contractors to limit and prohibit people's right to liberty and free movement through deprivation of liberty is a means of deliberately undermining a people's right to self-determination. In the race for the maximum profit, private security companies have left many of their detainees in situations in which they have even been stripped of the will to live and, in some cases, have resorted to taking their own lives.[21] These situations have rendered the most basic yet

[19] Richard Kish and Amy Lipton, "Do private prisons really offer savings compared with their public counterparts", *Economic Affairs*, vol. 33, No. 1 (February 2013).

[20] Vicky Peláez, "The prison industry in the United States: big business or a new form of slavery?", *Global Research* (2016). Available from www.globalresearch.ca/the-prison-industry-in-the-united-states-big-business-or-a-new-form-of-slavery/8289.

[21] American Civil Liberties Union, "Warehoused and forgotten: immigrants trapped in our shadow private prison system" (June 2014). Available from www.aclu.org/other/warehoused-and-forgotten-immigrants-trapped-our-shadow-private-prison-system.

fundamental right to human dignity non-existent, and need to be effectively addressed.

2. Barriers to transparency and limited legal relief

37. The Working Group notes that, in privatized prisons, transparency in terms of information regarding prisoners, as well as the manner in which the company operates, is a serious challenge. Information on privatized prisons is often not available for public scrutiny, and companies often resist attempts to obtain disclosure of contractual information. When there are allegations of misconduct by personnel in privatized prisons, or by their supervisors or government officials charged with overseeing the contract of the privatized prison, enforceable mechanisms for accountability and remedy have been found wanting. Often, companies contracting with the State can be given immunity.[22] Complex contract arrangements between the State and the private security operator can make it more difficult to hold company management and public officials liable for human rights violations. The cost of obtaining legal assistance for persons deprived of their liberty is also a serious obstacle.

B. Immigration-related detention

38. A worrying political discourse about migration, a rise in anti-immigrant policies in various countries, an increase in the criminalization of undocumented migration and the imposition of mandatory and indefinite immigration detention all give rise to further human rights concerns. Immigration detention has also become a source of profit for multinational private security companies in a number of countries. In this context, many private security companies have acquired contracts to operate detention facilities for irregular or undocumented migrants.

39. Over the past three decades, the privatization of migrant detention has developed in an increasing number of European Union countries in various forms and degrees. States are increasingly looking to private security companies for detention centres and the escorting of deported migrants. Some States rely heavily on multinational private contractors to run immigration detention facilities.[23] States sometimes delegate the construction and operation of immigration detention centres, including offshore facilities on the territory of a third country, to private contractors. In some countries, the majority of immigration detention centres are run by private security companies, including multinational companies. In the United States in late 2016, 73 per cent of the approximately 40,000 migrants detained by the authorities were held in facilities operated by private companies.[16]

40. It has commonly been argued by advocates supporting the privatization of detention that outsourcing may invite competition, which can lead to improvement of service and reduction of costs. Various studies have concluded, however, that in reality the actual level of competition among private security companies in the context of immigration detention appears to be very limited. An analysis of these multinational corporations reveals that the phenomenon of privatization of immigration detention is concentrated largely among a few companies operating in a

[22] Takei, "Private military and security companies in places of deprivation of liberty"; see also United States of America, Supreme Court, *Minneci v. Pollard*, case No. 565 U.S. 118 (2012).

[23] Migreurop, "Migrant detention in the European Union: a thriving business-outsourcing and privatisation of migrant detention" (July 2016). Available from www.migreurop.org/IMG/pdf/migrant-detention-eu-en.pdf.

handful of countries.[24] In the United States, the market can be so concentrated that a single private security company runs all privatized prisons within a particular state.[25]

41. Although most of the issues and challenges related to for-profit contractors in the realm of immigration detention are similar to those outlined in the previous section, there are specific human rights costs. Reports from civil society organizations have highlighted serious complaints about the condition and treatment of migrants and asylum seekers in facilities run by private security operators.

42. These cases clearly demonstrate that private management of immigration detention gives rise to human rights violations, since the welfare and human rights of detainees are in conflict with companies' profit targets.[23] Indeed, it has been reasonably argued that a primary rationale for immigration detention is not to meet legitimate and limited aims of administrative detention, but to satisfy the profit motives of private companies.[26] In the present section, the report will highlight some of the human rights concerns related to privately run facilities, including inhuman conditions, neglect, lack of adequate physical and mental care of detainees, economic exploitation, restrictions on religious freedom, ill treatment, physical abuse, sexual assault, deaths in custody, lack of transparency, lack of access to legal representation and other due process violations.

1. Conditions and treatment

43. What seems to be a commonly shared conclusion of many studies is that for-profit companies will inevitably seek to cut costs and thus have an adverse impact on the conditions of detention for migrants and asylum seekers. Deterioration in living conditions, a decline in the quality of services and an increase in security risks seem to be unavoidable consequences of the desire to maximize profit. Often, a reduction in the budget is translated into understaffing, a shortage of food, reduced medical assistance and the hiring of unqualified and untrained personnel. Reports show that some privately run immigration facilities are routinely understaffed. Some facilities hire underqualified medical staff, leading to unnecessary delays in the treatment of individuals who need urgent medical attention.

44. With regard to the detention of children and families, in 2014, the Australian Human Rights Commission conducted a detailed inquiry into the practice in that country of contracting with Serco, a private security company, to hold children in immigration detention on Christmas Island. Among other things, the report identified numerous incidents of assault, sexual assault and self-harm involving children.[27] In the United States, the Karnes County Residential Center, run by the GEO Group, houses accompanied children with their female relatives. The facility is a secure lockdown detention centre run with a rigid schedule. The facility is not licensed for the care of children, however, and the guards are not trained to address the needs of either mothers and children seeking asylum or trauma survivors.[28]

---

[24] See countries mentioned in para. 15.

[25] Megan Mumford, Diane Whitmore Schanzenbach and Ryan Nunn, "The economics of private prisons" (The Hamilton Project, 2016). Available from www.hamiltonproject.org/papers/the_economics_of_private_prisons.

[26] Flynn, "Private military and security companies in places of deprivation of liberty" (see footnote 9).

[27] Australian Human Rights Commission, *The Forgotten Children: National Inquiry Into Children in Immigration Detention 2014* (Sydney, 2014). Available from www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf.

[28] American Bar Association, "Family immigration detention: why the past cannot be prologue" (31 July 2015).

2. Sexual abuse

45. In recent years, reports have revealed inappropriate sexual behaviour by guards towards female detainees in immigration detention centres run by private security companies. Female detainees have allegedly been sexually abused by personnel of private security companies.[29] Detained women have felt vulnerable and isolated in these cases. In a particular immigration detention centre for women, run by a private security contractor in the United Kingdom, some detainees have reported being victims of rape and sexual violence.[30] The Special Rapporteur on violence against women, Rashida Manjoo, was denied entry to the facility to objectively seek information on violations reportedly being experienced by female detainees (A/HRC/29/27/Add.2, para. 29).

46. In the United States, an internal inspection body received reports of 13 incidents of sexual assault and abuse in a privately run immigration detention facility. The private security company notified the overseeing governmental agency of only one case, however.[31]

3. Misuse of solitary confinement

47. Reports show that solitary confinement is used as a form of disciplinary punishment or retaliation by personnel of private security companies in immigration detention facilities. In 2014, detainees in a facility run by a private security company went on hunger strike to protest poor conditions of confinement and indefinite detention. Personnel made the detainees believe that they had been invited to meet with the management of the facility to discuss their grievances; in fact, the detainees were escorted directly into solitary confinement cells without the promised meeting. They were finally released following intervention by civil society organizations.[16]

48. In some privately run facilities, solitary confinement cells are used as overflow housing. New arrivals are housed in such cells until they can be transferred elsewhere.[16] Individuals belonging to certain religious groups have complained that they are prohibited by personnel of private security companies from conducting their religious practices, including scheduled times for weekly prayers. Some detainees are placed in solitary confinement for saying their prayers quietly together. In some privately run facilities, the catering service fails to provide adequate food after sunset for individuals who fast during the day.[31]

4. Mistreatment and death in custody

49. Reports have documented the deaths of detainees in the custody of facilities operated privately for the United States Immigration and Customs Enforcement.[32] In the United Kingdom, there have been several deaths of asylum seekers and migrants in the custody of privately run facilities. Inquiries concluded that some of the deaths were a result of excessive use of force, neglect by guards or lack of appropriate

---

[29] American Civil Liberties Union, "ACLU of Texas today files federal lawsuit on behalf of women assaulted at T. Don Hutto Detention Center", press release (19 October 2011). Available from www.aclu.org/news/documents-obtained-aclu-show-sexual-abuse-immigration-detainees-widespread-national-problem.

[30] Global Detention Project, "United Kingdom immigration detention profile" (October 2016). Available from www.globaldetentionproject.org/immigration-detention-united-kingdom-2.

[31] CIVIC and Detention Watch Network, "Abuse in Adelanto: an investigation into a California town's immigration jail" (October 2015). Available from www.endisolation.org/wp-content/uploads/2015/11/CIVIC_DWN-Adelanto-Report_old.pdf.

[32] Human Rights Watch, "US: deaths in immigration detention" (7 July 2016). Available from www.hrw.org/news/2016/07/07/us-deaths-immigration-detention.

medical treatment. In some cases, no explanation was provided for the death of the detainees.[23]

50. The Special Rapporteur on the human rights of migrants documented incidents of human rights abuses of refugees and asylum seekers, including children, by a private security company contracted by the Government of Australia to operate in offshore facilities in Nauru and Papua New Guinea (A/HRC/35/25/Add.3). The Working Group has transmitted communications to the respective Governments concerning allegations of human rights abuses committed by the private security company operating in the offshore facilities in Nauru and Papua New Guinea.[33]

5. Violations related to due process

51. Studies show that the release of an asylum seeker from detention before a final hearing greatly affects the chances of establishing the merits of an asylum claim, since a release allows for more time to prepare the claim and better and more frequent access to lawyers, witnesses, experts and translators, who can help prepare and document the case.[28]

52. A study conducted in the United States found that, for those migrants and asylum seekers who had legal representation and were not detained, the success rate of obtaining relief was 74 per cent, compared with an 18 per cent success rate for those who were legally represented but detained, and that the rate of successful outcomes for those who were detained and unrepresented was only 3 per cent. The study also concluded that legal representation was a deciding factor in whether an asylum seeker passed the mandatory screening interview and ultimately obtained asylum.[34]

53. While detention in general makes it difficult for migrants and asylum seekers to prepare their cases and establish the merits of their claims, individuals detained at privately run facilities face additional challenges in obtaining adequate legal services, owing to various obstacles, some of which seem to be uniquely associated with the for-profit nature of these facilities.

54. Many private immigration detention facilities are built in hard-to-reach and remote areas, including offshore locations. These remote locations make it difficult for migrants and asylum seekers to secure the paid or pro bono legal services to which they are entitled. Because of the long distance, detained persons sometimes cannot meet with their legal representatives on a regular basis, which significantly impedes their ability to prepare their cases.[23]

55. It has been argued that, even when lawyers are dedicated to traveling and visiting their clients who have been detained at remote facilities, further impediments exist. Reports show that some contractors impose arbitrary restrictions on legal visitation and the activities of counsel at detention facilities. Some facilities have adopted informal, often non-transparent and inconsistently enforced, policies that have made attorney-client communications and consultations difficult and time consuming.[23] In the United States, privately run facilities sometimes impose restrictive requirements on legal visitation that are not usually applied at State-run facilities. For example, a few immigration detention facilities run by private security companies require security clearance for law students who work as pro

[33] Available from https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=14026 and https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=13897.

[34] Steering Committee of the New York Immigrant Representation Study Report, "Accessing justice: the availability and adequacy of counsel in removal proceedings", *Cardozo Law Review*, vol. 33, No. 2 (December 2011).

bono legal volunteers. Some legal volunteers have been denied entry for no apparent reason, even though they had previously been approved for entry. Legal personnel have been denied access when they did not provide 24-hour advance notice of the specific detainees with whom they wanted to meet. In the same facility, pro bono attorneys have been refused food or water in the visitation room and further warned that, if they leave to get food, they will not be permitted to re-enter on the same day. As a result, one team of pro bono attorneys spent 11 hours without food or water in order to finish their work with detainees.[35] Some privately run facilities banned particular legal service providers from entry as a form of retaliation against criticism published by them about the facility or their participation in peaceful protests denouncing the facility.[36] All these practices create further barriers for the lawyers trying to gain access to their clients, which in turn undermines the detainees' due process rights to legal representation.

56. In addition, at some privately run facilities, legal personnel are often prohibited from bringing communication technology devices, such as mobile phones, laptops and Wi-Fi hotspot devices, into detention centres, although these devices are vitally important for developing the cases. These arbitrary policies, which are often not in line with the national standards, deny detainees the benefits of the full scope of available services that are available to non-detained clients of the same attorneys.[37]

57. Other unwarranted restrictions include limiting the access of lawyers to various records and documentation regarding the detainees, and limiting the amount of time that detainees can spend in law library.

58. The detention of migrants and asylum seekers in confined and prison-like facilities, in combination with these additional constraints imposed by private contractors, hinders the ability of detainees to access legal counsel, communicate with potential witnesses and benefit from the assistance of interpreters, among other things. It has a further negative effect on the capacity of migrants and asylum seekers to pursue legal relief based on the merits of their claims.

6. Economic exploitation

59. Cost cutting in privately run facilities comes mostly from a reduction in the number of staff, which are sometimes replaced by self-service systems or simply by detained migrants themselves. Although detained migrants or asylum seekers are generally not authorized to work, reports show that privately run immigration detention facilities sometimes hire detainees, on a voluntary basis, to conduct simple day-to-day tasks, such as cleaning and catering. In order to reduce the operational cost and maximize profits, detainees at for-profit facilities are paid less than the national minimum wage for their work. In the United Kingdom, detainees can be paid between £1 and £1.25 per hour, which is one-sixth of the hourly rate paid outside detention facilities for the same type of work.[38] In the United States, detainees at immigration detention facilities run by private contractors can be paid

[35] American Bar Association, "Family immigration detention: why the past cannot be prologue", sect. IV.B.2; see also, generally, United States, Immigration and Customs Enforcement, *Family Residential Standards*, sect. 5.8; see also United States, Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, sect. 5.7, available from www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf.

[36] Decl. of Victoria Rossi, *Flores v. Holder*, No. 2:85-cv-04544 (C.D. Cal. Apr. 22, 2015); see also Brad Tyer, "Paralegal blocked from Karnes Detention Center after Observer story", *Texas Observer* (27 March 2015). Available from www.texasobserver.org/paralegal-denied-access-to-karnes; and CIVIC and Detention Watch Network, "Abuse in Adelanto".

[37] American Bar Association, "Family immigration detention" (see footnote 28).

[38] Migreurop, "Migrant detention in the European Union" (see footnote 23).

only $1 per day. A bottle of mineral water at the commissary of the same facility costs more than that.

60. Telephone service provided at privately run immigration detention facilities is particularly expensive, with much higher rates than those charged outside the facility. The fact that mobile phones are confiscated from migrants and asylum seekers upon their arrival at the facility forces them to rely on the telephone service provided by the facility. The high price of telephone service obviously hinders the capacity of detained migrants and asylum seekers to communicate with their lawyers and families. This has a further negative impact on their capacity to pursue their asylum claims.

7. Lack of transparency

61. Immigration detention facilities run by private security companies have been criticized for their lack of transparency. It is generally observed that lawyers, journalists, civil society actors and independent monitoring bodies have less access to facilities run by private contractors than to public ones. While national laws often require public agencies to disclose their records to the public upon request, these laws are often not applicable to information in the possession of private actors. In the meantime, reports show that private security companies have spent a significant amount of money actively lobbying to defeat efforts to amend national legislation in this regard. Withholding information in the name of commercial confidentiality permits private contractors to place their own desire for business secrecy over the public interest. As a result, there is often less public scrutiny of these privately run facilities, while lack of transparency may cause detainees to be more at risk of abuse.

8. Implications for national legislation and national immigration policies

62. Control of detention facilities by private contractors causes perverse incentives that may lead to the detention of more people for longer periods of time. Multinational private security companies have a strong incentive to contribute to the public discourse regarding the normalization of detention of irregular migrants, to influence national immigration policy and to lobby for repressive national legislation to further criminalize the status of irregular migrants, including asylum seekers. As previously noted, many private security companies manage to include guaranteed minimum bed quotas in their contracts with Governments. In addition to the minimum bed quota, some companies offer a discount on the per diem rate for additional beds that exceed the minimum bed quota to encourage the contracting governmental agency to use the full capacity of the facility.

63. In the United States, critics have argued that privatized prison companies have sought to increase profits by influencing substantive criminal legislation in ways that would drive up the prison population. In situations in which private contracting companies receive payment based on the number of prisoners they oversee, incentives would likely push them to use political leverage to ensure that their detainee population is as high as possible.[39] In the 100 days after the executive orders regarding immigration enforcement priorities were signed by President Donald Trump, United States Immigration and Customs Enforcement said that it had arrested more than 41,000 people, an increase of 37 per cent over the same period during the previous year.[40]

[39] Allard K. Lowenstein International Human Rights Clinic, Yale Law School, "Inherently governmental functions and the role of private military contractors".

[40] United States, Immigration and Customs Enforcement, "ICE ERO immigration arrests climb nearly 40%", available from www.ice.gov/features/100-days.

V. Challenges for accountability and remedies

64. When private actors operate detention facilities, questions often emerge about who has effective control over detainees and who should be held accountable when human rights abuses occur. Governments have at times tried to use the privately operated nature of facilities as a shield to protect themselves from being liable for violations.[41] It has been observed that outsourcing the operation of places of deprivation of liberty seems to serve the political interests of some States, insofar as it allows those States to dilute the responsibility of public authorities vis-à-vis detention facilities and the rights violations they generate.[42]

65. Individuals held at many facilities run by private security companies often cannot appeal grievance decisions made by the warden, who is normally an employee of the company. The lack of the ability to appeal to a public official is likely to impede accountability for human rights abuses.[43] In order to fulfil contractual obligations and avoid financial sanctions and any legal liability, private security companies have a strong incentive to underreport incidents of abuse and, in some cases, manipulate the reporting of the circumstances of these events. The inherent unreliability of self-reporting, in combination with the lack of transparency of privately run facilities, results in human rights abuses and violations that are committed by private security company personnel remaining unknown to the public.

66. Even when abuses and violations have been disclosed by civil society, including the media, no real sanctions seem to have been imposed on the company, other than the reputational attack that the private security company may suffer in certain cases. Specific cases have established that private contractors have greater immunity from liability than their government counterparts.[44]

67. Reports show that many private security companies do not face serious consequences when they fail to meet the terms of their contracts. Despite reports of abuses, some private security companies keep running the facilities where the abuses have occurred. For example, one facility received a passing grade even after having failed a mandatory component of the annual performance evaluation. In the same place, after it was found that the death of a detainee had been preventable, inspectors determined that the facility was in compliance with the applicable medical standard.[45]

68. Privatization of detention has made it more difficult to investigate and prosecute alleged human rights abuses and violations. For instance, in the context of immigration detention, victims and witnesses are often deported or threatened with deportation after having reported abuses.[46]

[41] Flynn, "Private military and security companies in places of deprivation" (see footnote 9).

[42] Migreurop, "Migrant detention in the European Union" (see footnote 23).

[43] Takei, "Private military and security companies in places of deprivation of liberty" (see footnote 16).

[44] United States, Supreme Court, *Minneci v Pollard* (see footnote 22) and *Correctional Services Corp. v. Malesko*, case No. 534 U.S. 61 (2001).

[45] CIVIC and Detention Watch Network, "Abuse in Adelanto" (see footnote 31).

[46] Migreurop, "Migrant detention in the European Union (see footnote 23)"; see also Mark Townsend, "Serco, the Observer, and a hunt for the truth about Yarl's Wood asylum centre", *The Guardian* (17 May 2014). Available from www.theguardian.com/uk-news/2014/may/17/serco-yarls-wood-asylum-centre.

VI. Conclusions and recommendations

Conclusions

69. **While privatization of deprivation of liberty may not be a violation of international law per se, it is essential to consider that outsourcing creates great risks for the violation of human rights, including impediments to accountability and remedy for victims. Simply put, in matters of deprivation of liberty, the profit motive is incompatible with, and will normally override respect for, human rights in the absence of strict regulation. Nevertheless, States will likely continue to contract with private security companies in the operation of prisons and detention facilities.**

70. **The Working Group notes the importance of exercising due diligence by both States and private security companies to safeguard against potential human rights violations. Due diligence requires that the private security company actively seek information about the negative human rights impacts of its activities, as well as about the risk that negative human rights impacts might occur in the future. This triggers a responsibility by the company to mitigate potential or existing violations, and to remediate previous violations.**[47]

71. **In the light of the need to strengthen accountability frameworks for those deprived of their liberty in privately operated facilities, the Working Group notes the importance of States ensuring that private operators comply with human rights obligations.**[48]

72. **An analysis of the struggles of victims for accountability and remedy against private security companies proves that voluntary codes, human rights due diligence and other voluntary measures, while essential, are themselves not sufficient to hold companies accountable or provide a means of redress. Measures must be mandatory, judicially enforceable and backed up by meaningful sanctions.**

Recommendations to States

73. **In the light of the human rights challenges in the context of privatized places of deprivation of liberty, the Working Group makes the below recommendations to States.**

74. **States should terminate the practice of outsourcing the overall operation of prisons, jails, immigration detention facilities and other places of deprivation of liberty to for-profit private security companies.**

75. **For States that continue to contract out certain responsibilities in the context of deprivation of liberty, certain functions should not be outsourced to private security companies, including the punishment of disciplinary infractions by detainees, the computation of sentences, the placement or release of detainees and the granting of temporary leave, where applicable.**

76. **In the context of global migration trends, States should consider community-based alternatives, which are likely to be more economical and**

[47] Mark B. Taylor, "Human rights due diligence: the role of States — 2013 progress report", (International Corporate Accountability Roundtable, 2012). Available from https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657c1d9f7456750f7ae707/1483045919859/1 AR-Human-Rights-Due-Diligence-2013-Update-FINAL1.pdf.

[48] See CCPR/CO/75/NZL and CCPR/C/79/Add.55.

effective than deprivation of liberty. The Working Group stresses that detention should be used as a last resort and under the least restrictive means possible, particularly for individuals belonging to vulnerable groups, such as children, women and asylum seekers.

77. **When considering the involvement of private actors in providing services in places of deprivation of liberty, States should conduct a full analysis of the infrastructure and processes required by their justice systems in order to meet international human rights norms and standards. Through legislative measures, States should ensure that private security companies and their personnel are in compliance with relevant international human rights standards.**

78. **States should ensure that legislation and contracts between public agencies and private security companies include sufficiently detailed obligations with respect to international human rights standards. Such contracts should set up a clear delineation of responsibilities, including regular reporting requirements and robust monitoring provisions, and should also set forth effective means for addressing contractor non-compliance, up to and including contract cancellation.**

79. **States should impose contractual obligations, on private service providers or as part of the provision of subsidies or financial incentives for private operators, to work towards continual improvement in the realization of human rights when such a course would not otherwise be profitable. For example, private firms running prisons or detention centres might be offered bonuses under their contracts with the Government for facilitating ongoing medical, social or human rights training for their staff, with a view to improving the rights of inmates.**[49]

80. **It is essential for States to establish effective accountability, oversight and remedy mechanisms when contracting with private security companies in places of deprivation of liberty. Both private security companies and their personnel must be subject to civil liability and penal accountability for violations of human rights. Such civil and criminal accountability must be judicially enforceable and not subject to State or other immunities.**

81. **States should provide meaningful oversight of detention operations involving private security companies through an on-site presence at facilities of governmental officials who are authorized to intercede quickly and as often as necessary, and ensure that effective compliance mechanisms are in place to track performance and outcomes and make reliable information readily available to the public.**

82. **States should establish external monitoring and inspection mechanisms and not rely solely on inspections conducted by the governmental agency contracting with a particular private security company. A body fully independent of the contracting agency should carry out regular inspections. Reports of the inspections should be made public.**

83. **States should ensure that records maintained by private security companies that provide services in places of deprivation of liberty are subject to freedom-of-information laws to the same extent as public entities.**

84. **States should facilitate independent examination of allegations of abuse at places of deprivation of liberty run by private security companies, ensure that all complaints are thoroughly investigated and ensure effective remedies to**

[49] Ibid.

victims of human rights violations committed by private security companies and their personnel.

85. The Working Group notes the importance of strong national legislation that provides for effective remedies for victims of human rights violations committed by private security company personnel, particularly when such companies and personnel operate transnationally. In this regard, States should take all measures necessary to ensure the legal liability of companies based in or managed from the State party's territory regarding human rights violations as a result of their activities conducted abroad or the activities of their subsidiaries or businesses. National legislation should contain extraterritorial provisions, which can facilitate the prosecution of private security companies and their personnel.

86. Notwithstanding the importance of national legislation and strong contractual obligations that incorporate international human rights standards, the Working Group, through its global study on national laws, has noted the need for a comprehensive legally binding instrument to regulate private military and security companies in the diverse contexts in which they operate. Such an instrument would ensure consistent regulation worldwide and adequate protection of the human rights affected by these companies. An international binding instrument would provide a standard regulatory framework and a single dedicated body on various essential issues related to the activities of private military and security companies, ensure the accountability of these companies and their personnel, and guarantee the right to effective remedies for victims wherever they are in the world.

Recommendations to private security companies and States

87. In the light of the human rights challenges in the context of privatized places of deprivation of liberty, the Working Group makes the below recommendations to private security companies and States.

88. Contracts for private security companies operating in places of deprivation of liberty should adhere to international human rights standards, particularly the United Nations Standard Minimum Rules for the Treatment of Prisoners. These include rules regarding the treatment of detainees and prisoners, the recruitment of trained and skilled personnel, and inspections and contact with the outside world.

89. Contracts with private security companies should comply with regular reporting and robust monitoring requirements set out in their contracts, which should also set forth effective means for addressing contractor non-compliance, up to and including contract cancellation.

90. Private security companies need to comply with due diligence rules, which require them to assign investigative responsibility within their organization for the detection and investigation of human rights violations. Companies should also create mechanisms that provide protections for whistle-blowers.

91. Companies should cooperate fully with any external monitoring and inspection mechanisms established to oversee their operations.

92. Private security companies should publicly disclose records with regard to their contracts and operations, to the same extent as public entities with similar functions.

93. **Companies should establish effective accountability, oversight and remedy mechanisms, including non-judicial remedies, for victims of human rights violations. Contracts and legislation must not make exhaustion of contractual and non-judicial remedies a precondition of resort to judicial enforcement of accountability and remedy.**

United Nations A/72/287

General Assembly

Distr.: General
4 August 2017

Original: English

Seventy-second session
Item 71 (b) of the provisional agenda*
Elimination of racism, racial discrimination, xenophobia and related intolerance: comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action

Combating racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action

Note by the Secretary-General

The Secretariat has the honour to transmit to the General Assembly the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mutuma Ruteere, prepared pursuant to General Assembly resolution 71/181.

* A/72/150.

17-13397 (E) 060917

Please recycle

Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

Summary

In the present report, the Special Rapporteur analyses the challenges linked to combating racism, xenophobia and discrimination in the current counter-terrorism context. First, he discusses the various manifestations of racism, racial discrimination and xenophobia emerging from State counter-terrorism measures as well as the human rights implications of such practices for affected communities. He then provides an overview of relevant international, regional and national norms prohibiting racism and xenophobia, especially in the context of countering terrorism. Drawing from an expert meeting that he convened on the topic, he examines key legal, policy and institutional measures taken by relevant stakeholders and highlights some examples of good practices in combating racism, xenophobia and discrimination while countering terrorism.

Contents

		Page
I.	Activities of the Special Rapporteur	3
	A. Country visits	3
	B. Other activities	3
II.	Challenges to combating racism and xenophobia in the context of countering terrorism	3
	A. Introduction	3
	B. Manifestations of racism, xenophobia and discrimination in the context of countering terrorism	4
	C. International, regional and national norms prohibiting racism and xenophobia, especially in the context of countering terrorism	12
	D. Good practices in combating racism, xenophobia and discrimination in the context of countering terrorism	15
III.	Conclusions and recommendations	22

I. Activities of the Special Rapporteur

1. The present report is submitted pursuant to General Assembly resolution 71/181.

A. Country visits

2. The Special Rapporteur expresses his gratitude to the Governments of Australia and Fiji for the cooperation extended to him during his visits to these countries from 28 November to 5 December 2016 and 7 to 12 December 2016, respectively.[1]

3. The Special Rapporteur would like to thank the Governments of the United Kingdom of Great Britain and Northern Ireland and Morocco for inviting him to visit and hopes to honour these invitations soon. He further hopes to receive positive replies to his requests to visit India, Japan, South Africa, Thailand and the United States of America.

B. Other activities

4. The activities of the Special Rapporteur from July 2016 to March 2017 are reflected in his report to the Human Rights Council at its thirty-fifth session (A/HRC/35/41). Since March 2017, the Special Rapporteur has participated in a panel at the thirty-fourth session of the Human Rights Council, in March 2017, on the issue of racial profiling, as well as a commemorative event for the International Day for the Elimination of Racial Discrimination at the seventy-first session of the General Assembly on 21 March 2017.

5. The Special Rapporteur participated as a panellist at the first informal thematic consultation on human rights of all migrants, social inclusion, cohesion and all forms of discrimination, including racism, xenophobia and intolerance, which took place in Geneva on 8 and 9 May 2017, in the context of the global compact for safe, orderly and regular migration.

6. The Special Rapporteur was also invited to attend the informal meeting of the General Assembly in New York on 18 July 2017 to observe the annual Nelson Mandela International Day.

II. Challenges to combating racism and xenophobia in the context of countering terrorism

A. Introduction

7. The upsurge in terrorist attacks in recent times has prompted States in various regions of the world to adopt a variety of counter-terrorism measures. Despite the lack of consensus on a definition of terrorism, new frameworks have been adopted at the international, regional and national levels, obliging States to take measures to protect individuals from the threat of terrorist acts and to bring the perpetrators of such acts to justice. However, in many countries, counter-terrorism measures have provoked concern over human rights protection. Some States have adopted aggressive counter-terrorism legislation and policies, often used to target members of minority communities and religions. The Special Rapporteur has found that

[1] See A/HRC/35/41/Add.2 and Add.3.

counter-terrorism measures have disproportionately affected Muslims as well as migrants, refugees and asylum seekers. Such measures are not only contrary to the principles of equality and non-discrimination, but also prevent affected communities from fully enjoying a wide variety of other human rights.

8. In line with Human Rights Council resolution 7/34 of 2008, successive mandate holders have addressed the impact of counter-terrorism measures on the rise of racism, racial discrimination, xenophobia and related intolerance in their thematic and country visit reports. The present report builds on the work of the current and previous mandate holders,[2] as well as reports of other relevant special procedures mandate holders and United Nations bodies. It also takes into account recent developments and information gathered, notably through an expert meeting and additional research on the topic.

9. During the expert meeting, convened by the Special Rapporteur and held in Budapest on 22 and 23 June 2017, academics, practitioners and civil society representatives discussed the patterns and manifestations of racism, racial discrimination and xenophobia emerging from State counter-terrorism practices. After examining trends and challenges in different regions, participants exchanged views on the key legal and policy measures taken at the national, regional and international levels, as well as good practices in combating racism, xenophobia and discrimination while countering terrorism.

10. Drawing from the Special Rapporteur's analysis and with the benefit of insights from the expert meeting, the present report seeks to provide an updated overview of the manifestations of racism, xenophobia and discrimination in the context of countering terrorism (sect. II.B). The Special Rapporteur then provides an overview of key international, regional and national norms prohibiting racism and xenophobia, especially in the context of countering terrorism (sect. II.C). He also shares some examples of good practices in this context which were identified by the participants at the expert meeting (sect. II.D). The conclusions and recommendations are set out in section III.

B. Manifestations of racism, xenophobia and discrimination in the context of countering terrorism

1. Rise of political extremism and increased incidence of racist and xenophobic hate speech and violence

Rise of populist movements

11. The Special Rapporteur notes that one trend linked to the fight against terrorism is the rise of populist extremist movements. In Europe, the average vote share of populist parties has increased continuously since the 1980s, from 10.1 per cent in 1980 to 11.3 per cent in 2000 and 18.4 per cent in 2017. Populist parties are currently represented in nine governments and hold 17.5 per cent of all seats within European national parliaments.[3] While the rise of political extremism is a complex phenomenon, evidence shows that factors contributing to a favourable climate for the increasing acceptance of extremist ideology include widespread concerns over the global economic crisis and the rise in economic disparity, the spread of terrorism and the sharp increase in migration flows. The Special Rapporteur is equally concerned that more traditional parties have adopted tougher stances on issues such

[2] See, for example, A/HRC/9/12; A/HRC/20/33; A/HRC/29/46; A/HRC/35/41.

[3] European Policy Information Center, "TIMBRO authoritarian populism index 2017: a summary", 2017, pp. 1-2.

as security, migration and integration in order to counter the rise of right-wing populist parties.[4]

Rise of racist and xenophobic speech

12. The Special Rapporteur expresses concern that another trend which has intensified globally following recent terrorist attacks is the proliferation of anti-immigrant and anti-Muslim rhetoric, both in politics and the media. Populist parties, in particular, try to gain support and attract voters by capitalizing on constituents' fears over the financial burdens of migration and perceptions that foreigners are overrepresented in crime, take resources and jobs away from nationals, pose a threat to national identity or have religious practices that are incompatible with modern societies.[5]

13. In the 2017 elections of one European country, a right-wing populist party gained seats in parliament after running a campaign dominated by anti-Islam slogans, calling for a halt to Muslim immigration, the closure of mosques and a ban on the Qur'an.[6] Another right-wing populist party in Europe has suggested in parliament that immigrants should celebrate local religious holidays in order to become part of the nation.[7] In one South Pacific country, a nationalist far-right party ran a political campaign that utilized anti-Muslim rhetoric. The party made unexpectedly large gains in the 2016 parliamentary elections, resulting in greater bargaining power vis-à-vis the ruling party.[8]

14. The Special Rapporteur is concerned that racist and xenophobic speech has increasingly entered the mainstream discourse, a phenomenon that is mirrored in various regions of the world. In one Eastern European country, the Government and the national media initiated a public campaign against Muslims and foreigners. In 2015, the Government launched so-called "national consultations" by asking households to complete a survey on immigration and terrorism. The campaign was widely criticized for linking migration with terrorism and for its suggestive questions that actively promoted hostility and xenophobia. The results of the survey were subsequently used for an anti-immigrant billboard campaign. In addition, constitutional amendments were introduced to enshrine the Christian character of the nation.[9] Xenophobic rhetoric was also on the rise in another Eastern European country, with refugees being described as a dangerous threat to public health.[10]

15. Political actors in one Middle Eastern country have frequently associated the country's minority and their political aspirations in the region with radical Islam.[11] Similarly, political and religious actors in several Asian countries have promoted negative portrayals of Muslim ethnic minorities by linking them to terrorist groups or depicting them as dangerous and foreign invaders.[12]

---

[4] European Union Agency for Fundamental Rights, *The European Union as a Community of Values: Safeguarding Fundamental Rights in Times of Crisis* (Luxembourg, Publications Office of the European Union, 2013), p. 17.

[5] Ibid.

[6] See https://perma.cc/T8PU-Z7HL; https://perma.cc/FCL3-7ZE3.

[7] See https://perma.cc/9MJ4-W6MC.

[8] See https://perma.cc/BV5Q-AS42; https://perma.cc/VT6L-DUH4.

[9] Organization for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, "Fact-finding meeting: Hate motivated incidents targeting migrants, refugees and asylum-seekers in the OSCE region", December 2015, p. 4. See also https://perma.cc/D57P-9D4M.

[10] See goo.gl/MedFUj.

[11] See https://perma.cc/76SD-KUT3; https://perma.cc/948C-5U6F.

[12] See https://perma.cc/VJ9C-GYYR; https://perma.cc/R82Z-E8RN.

16. A rise in Islamophobic rhetoric can also be observed in some Latin American countries. In one South American country, for example, a popular news source published an article asserting that more than half of the Muslims in the world were radicalized.[13]

17. The Special Rapporteur notes that these examples demonstrate that the rise of anti-immigrant and anti-Muslim rhetoric in the mainstream political discourse is indeed a global phenomenon. However, he would also like to draw attention to the simultaneous increase in anti-Semitic speech. In many countries, anti-Semitism remains part of right-wing populist ideologies, often alongside Islamophobia.[14]

Role of political leaders and the media

18. The Special Rapporteur has previously expressed concern regarding the role of political leaders and the media in stigmatizing certain groups and thus fostering racist and xenophobic attitudes among the public.

19. In many countries, public officials and the media propagate prejudice and negative stereotypes regarding non-nationals and persons from minority communities or religions, including by linking them to violence and terrorism. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism explained how reports about a Syrian passport found on one of the perpetrators of the 2015 Paris attacks had fuelled fears concerning the connection between migration and terrorism. However, the Special Rapporteur highlighted the lack of evidence supporting claims that terrorists take advantage of migration flows or that refugees are more prone to radicalization. Research shows that very few migrants or refugees have carried out acts of terrorism.[15]

20. Political leaders in several Eastern European countries have made racist and xenophobic statements to further their own agendas. The Government of one country invoked a state of crisis by claiming that migration poses a threat to security, public health and national identity. The Prime Minister referred to migration as the "Trojan wooden horse of terrorism". He has frequently argued that measures taken to stop the influx of migrants, refugees and asylum seekers are necessary to protect the region from criminals and terrorists.[16] A minister of another Eastern European Government stated that, in the long run, migrant communities will form closed enclaves that provide support to terrorists.[17]

21. The media often perpetuates these stereotypes by disseminating or providing a platform for racists and xenophobic speech. The Special Rapporteur would also like to highlight that media bias is a particularly problematic phenomenon in a counter-terrorism context. The disproportionate coverage of certain types of terrorism, the use of certain terminology or images and the overall framing of news stories about terrorism distorts public perception. A recent study examined the domestic media coverage of terrorist attacks that occurred in one North American country during the period 2011-2015. The study found that attacks by Muslim perpetrators, particularly foreign-born Muslims, received 4.5 times more coverage than other attacks. Only a small proportion of attacks were perpetrated by Muslims (12.4 per cent) or foreign-born Muslims (5 per cent). Yet, these attacks received 44 per cent and 32 per cent of

[13] See https://perma.cc/BCQ5-HEWD.

[14] Lars Rensmann, "Resentment reloaded: how the European radical right mobilizes antisemitism and counter-cosmopolitanism", *Journal for the Study of Antisemitism*, vol. 3, No. 2 (2011), pp. 543-573.

[15] A/71/384, paras. 7-8.

[16] See goo.gl/Ly3Csp.

[17] See https://perma.cc/TR4G-RTVD.

the news coverage, respectively. Research also found that an attack is more likely to be considered an act of terrorism when carried out by a Muslim.[18] By contrast, threats posed by right-wing violence are often underestimated and not considered to be terrorism.[19]

Racist and xenophobic violence and hate crimes

22. In the context of the heightened fear of terrorism, racist and xenophobic speech is increasingly translated into hate crimes and violence towards certain groups. The Special Rapporteur is especially concerned about hate crimes targeting migrants, refugees and asylum seekers. Harassment and violent attacks against these groups were reported in several European countries. Where the perpetrators could be identified, they were most often found to be vigilante groups or individuals with ties to right-wing extremist groups.[20] Attacks in one Western European country included vandalism and arson attacks against refugee reception facilities. As compared with 2014, such xenophobic attacks increased drastically in 2015 and 2016.[21]

23. In some countries, an increase in violence towards Muslims can be observed in the aftermath of terrorist attacks. In one South American country, a drastic increase in anti-Muslim hate crimes was reported following widely televised terrorist attacks that occurred in 2015.[22] Terrorist attacks also affected the security of Muslim communities across Europe. In the aftermath of a 2015 attack, mosques in several European Union member States began to receive police protection. The national human rights institution in one country recorded 429 violent acts and threats motivated by Islamophobia in 2015, a 223 per cent increase from the previous year. Such incidents have reportedly become more violent and involved grenades, live ammunition and arson.[23] A recent report examining the intersectional discrimination affecting Muslim women found that, in many countries, the majority of Islamophobic hate crimes target Muslim women, especially those wearing headscarves.[24]

24. The Special Rapporteur also expresses concern that some Governments use the fight against terrorism as justification for the continuous repression of ethnic minorities. In response to a series of terrorist attacks, the Government of one East African country drastically increased the policing of ethnic and Muslim communities.[25] In 2014, over 6,000 police officers carried out home raids and arbitrarily arrested and detained almost 4,000 people in one particular neighbourhood. The majority of those affected were arrested on suspicion of terrorist links and belonged to the country's ethnic minority.[26] It was also alleged that, instead of being brought to court, many terrorist suspects were forcibly disappeared or killed extrajudicially.[27] In 2016, the Government of one Asian

[18] Erin M. Kearns, Allison Betus and Anthony Lemieux, "Why do some terrorist attacks receive more media attention than others?", 5 March 2017.

[19] United Nations Educational, Scientific and Cultural Organization (UNESCO), *Terrorism and the Media: A Handbook for Journalists* (Paris, 2017), p. 22.

[20] European Union Agency for Fundamental Rights, *Fundamental Rights Report 2017* (Luxembourg, Publications Office of the European Union, 2017), p. 79.

[21] European Union Agency for Fundamental Rights, *Current Migration Situation in the EU: Hate Crime* (Luxembourg, Publications Office of the European Union, 2016), p. 4.

[22] See https://perma.cc/LU7R-M9B7 (in Portuguese).

[23] See https://perma.cc/9JAT-6V7A.

[24] European Network Against Racism, "Forgotten women: the impact of Islamophobia on Muslim women", (Brussels, 2016), p. 26.

[25] See https://perma.cc/4X8V-XL2W.

[26] See https://perma.cc/P72G-4AJ7.

[27] Human Rights Watch, *World Report 2015: Events of 2014* (New York, 2015), p. 9.

country launched a violent counter-insurgency against one ethnic group, reportedly in retaliation for an attack that killed border police officers. Villages were burned and hundreds of civilians were beaten, raped or killed.[28]

2. Xenophobia and racism in immigration and border control policies

Freedom of movement

25. The Special Rapporteur notes that, in the light of increasing terrorist threats, some States have adopted measures aimed at preventing potentially dangerous individuals from entering a country, from travelling internally or from returning to a country where they have the right of abode. Aggressive counter-terrorism measures restricting freedom of movement have disproportionately affected persons from the Middle East.

26. In one Western European country, hundreds of people have been subjected to administrative bans, preventing them from leaving or entering the country since 2015.[29] Public authorities often justify those orders by resorting to counter-terrorism rhetoric.[30]

27. An executive order which was recently issued in one North American country suspended the refugee admissions programme for 120 days, stopping it indefinitely for refugees from a particular country. The order also imposed an entry-ban on nationals of seven Muslim-majority countries. National security concerns and the threat of terrorism were cited as justifications.[31] After the order had been blocked by lower courts, the country's Supreme Court has recently allowed a modified version to come into effect.[32]

Nationality

28. Similarly, the Special Rapporteur notes that legislative amendments in several Western Europe countries have made it easier for Governments to strip citizens of their nationalities if they are suspected of activities related to terrorism. Such amendments are particularly problematic where due process safeguards are not guaranteed. In some extreme cases, legislation does not require prior judicial authorization or allows for citizens to be stripped of their nationality while abroad.[33] The Special Rapporteur also expresses concern about a recent court ruling that could set a dangerous precedent for the discriminatory use of nationality-stripping measures in one Middle Eastern country. The judgment revoked the citizenship of an individual belonging to an ethnic minority on the basis of the Nationality Law, which allows for the revocation of citizenship for breach of loyalty to the State, including for terrorist acts.[34]

29. Many countries that have introduced nationality-stripping measures apply such measures to dual nationals only, thus ensuring that the removal of nationality does not result in statelessness.[35] However, the Special Rapporteur notes with concern

[28] See https://perma.cc/WH7G-KFCL.

[29] Bérénice Boutin, *Administrative Measures against Foreign Fighters: In Search of Limits and Safeguards*, ICCT research paper (The Hague, International Centre for Counter-Terrorism, 2016), pp. 11-12. See also Amnesty International, "Dangerously disproportionate: the ever-expanding national security state in Europe" (London, 2017), p. 50.

[30] See https://goo.gl/1WY8tm.

[31] See https://perma.cc/7245-GKMC.

[32] See https://goo.gl/dHgm1R.

[33] Amnesty International, "Dangerously disproportionate", pp. 58-63.

[34] See goo.gl/aCnHjB; goo.gl/SwF6bJ.

[35] Amnesty International, "Dangerously disproportionate", p. 58.

that legislation in one country allows for the removal of citizenship of foreign-born nationals who hold no other nationality.[36]

Measures targeting refugees and asylum seekers

30. The Special Rapporteur was informed that, responding to fears concerning the link between terrorism and the influx of refugees, many countries have enacted overly restrictive migration policies and xenophobic measures targeting asylum seekers and refugees. One Eastern European country has tried to keep refugees and asylum seekers out of the country by proclaiming a "state of emergency due to mass migration".[37] The Government has empowered the police and military to support the asylum authority in instituting expedited border procedures in so-called "transit zones". At the same time, judicial review of asylum decisions has been limited. In addition, new amendments to the country's Criminal Code have led to the criminalization of refugees and migrants who enter the country irregularly through its southern border. The amendments allow for the imposition of a wide range of penalties, including criminal convictions, prison sentences and mandatory expulsion.[38]

31. Across several Western European countries, the Special Rapporteur observed situations in which Governments failed to fully comply with the international law principle of non-refoulement. Some countries have deported individuals identified as threats to national security, even though they face a serious risk of persecution when returning to their countries of origin. A deportation order in one country was issued despite the fact that the country's own protection appeal body had determined that the deported person was likely to experience torture if returned to his country of origin.[39]

32. The Special Rapporteur was informed that, in May 2016, the Government of one East African country planned the closure of a large refugee camp. Citing national security concerns as partly informing the decision, the Government announced that refugees living in the camp would be returned to their home countries. The decision was later revoked, as the country's High Court found that the closure of the camp was illegal on the grounds that it would discriminate against refugees belonging to one particular ethnic minority.[40]

33. The Special Rapporteur also notes with concern that prejudice and fear have manifested in inhumane policies towards Muslim refugees in the Asia-Pacific region. He concurs with the Special Rapporteur on the human rights of migrants, who criticized the practice of detaining refugees in offshore immigration detention facilities and regional processing centres. In particular, he expressed concern at the securitization of migration and border control, the punitive approach towards irregular migration and the wide range of human rights violations that have been documented in such facilities.[41]

3. Overly broad counter-terrorism legislation

34. The Special Rapporteur is concerned that, contrary to the principle of legality and the rule of law, many States have adopted legislation with vague and overly broad definitions of terrorism.[42] The penal and criminal codes of some European

[36] See from https://perma.cc/7VAG-Y4AW.
[37] See https://goo.gl/9rtivf.
[38] Amnesty International, "Dangerously disproportionate", pp. 21-22.
[39] Ibid., pp. 64-68.
[40] See https://perma.cc/F2CN-S2AS.
[41] A/HRC/35/25/Add.3, para. 33.
[42] Human Rights Watch, "Overreach: how new global counterterrorism measures jeopardize rights", 2017.

countries include vague terminology and definitions related to terrorism. Charges related to the incitement of terrorism increasingly refer to general terms such as "glorification" and "public provocation".[43] One Western European country even removed the requirement that incitement to terrorism pose an actual risk of a terrorism-related offence being committed.[44] In Europe, such vague legal definitions are often the result of right-wing populist initiatives fuelling fears of Muslim radicalization.

35. The Special Rapporteur notes that overly broad legislation creates legal uncertainty, leaves room for disproportionate and discriminatory application of counter-terrorism laws and sometimes results in the violation of fundamental human rights. Far-reaching and ambiguous definitions of terrorism and violent extremism have enabled many countries to criminalize the legitimate exercise of fundamental rights, including freedom of expression and freedom of peaceful assembly and of association.[45] In one North American country, Muslim charities feel particularly targeted by investigations, raids and asset seizures, creating the false impression of their involvement in terrorist financing.[46] In one European country, the so-called "apology of terrorism" offence has been used to charge hundreds of people, in particular Muslims, for posting comments on social media, even though these comments do not incite violence.[47]

36. Similarly, vaguely worded legislation has enabled public authorities in one Western European country to assume disproportionate powers with respect to counter-terrorism. A state of emergency has been enacted in order to address "public disaster" or a "serious threat to public order". In this context, political leaders and local government officials have been granted vast powers to impose a range of administrative measures, such as searches and house arrests, against individuals perceived as a threat. These measures are problematic in terms of access to justice and due process rights, as prior judicial authorization is not required and judicial oversight is generally limited. Moreover, the Special Rapporteur is concerned that the application of such measures is often disproportionate. Instead of being grounded in evidence, administrative measures often target Muslims and persons of North-African descent.[48]

37. The Special Rapporteur further expresses concern that, in some countries, overly broad counter-terrorism legislation has a negative and discriminatory impact on the human rights of indigenous peoples, including their economic, social and cultural rights. In one Latin American country, the use of vague counter-terrorism legislation has led to abuse and stigmatization of an indigenous population asserting their rights to self-determination and to their ancestral lands. Their activism and land protests continue to be characterized as terrorism, both in the media and the political discourse. The vague nature of domestic counter-terrorism legislation has allowed for its disproportionate application against members of the indigenous community. This has not only had a detrimental impact on the enjoyment of various human rights, but has also contributed to targeted violence and excessive force against the community by law enforcement officials.[49]

---

[43] Bibi van Ginkel, "Incitement to terrorism: a matter of prevention or repression?", ICCT research paper, August 2011.

[44] See https://perma.cc/A7CV-98JA.

[45] See, for example, A/70/371; A/HRC/31/65, paras. 43-47; A/61/267; A/HRC/7/14, paras. 47-53; A/HRC/35/28/Add.1, paras. 6-28.

[46] A/HRC/35/28/Add.2, para. 67 (a).

[47] Amnesty International, "EU: Orwellian counter-terrorism laws stripping rights under guise of defending them", 17 January 2017.

[48] See https://perma.cc/BP5Z-QEVR; https://perma.cc/5R9F-JHNV.

[49] See CERD/C/CHL/CO/19-21; A/HRC/25/59/Add.2.

38. Similarly, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism highlighted that, in times of counter-terrorism, land evictions and house demolitions are sometimes used as forms of targeted or even collective punishment for residents who are suspected of supporting terrorist groups. According to the Special Rapporteur, such evictions tend to affect persons who find themselves in vulnerable situations, including indigenous peoples and ethnic, religious and other minorities.[50]

4. Surveillance of racial minorities and groups perceived as foreign

39. The Special Rapporteur is concerned that, in many countries, overly broad legislation has led to policing practices which target racial and ethnic minority communities. For instance, he has been informed that the police force in one North American city uses dragnet surveillance of the local Muslim community. Services at mosques are observed, entrances are filmed and daily reports are prepared on some Muslim individuals.[51] The surveillance has failed to provide any actionable intelligence and the matter has been brought before the courts.[52]

40. Similarly, in the light of global terrorist threats, the Government of one East Asian country initiated an extensive surveillance programme targeting Muslims. The programme allegedly had a disproportionate impact on migrants, as 90 per cent of Muslims living in the country are foreign born. An investigation revealed that police had surveilled 72,000 individuals from Muslim-majority countries in order to collect their personal information and to create résumé-like files on them. A high court later found those privacy violations to be legal because they were "necessary and inevitable" to protect the country from terrorism.[53]

41. The Special Rapporteur observed a similar trend throughout Western Europe. For instance, the 2015 surveillance law in one Western European country empowers the Prime Minister to authorize the use of surveillance measures, such as capturing mobile phone calls and black boxes from Internet service providers, for the purpose of protecting foreign policy interests. Prior judicial authorization is not required. More recently, with the goal of preventing terrorism, that same country extended surveillance to individuals suspected of "association" with someone who may constitute a threat.[54]

42. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has also expressed concern regarding discriminatory surveillance and data-mining practices. For example, he criticized laws and policies on mass surveillance, which often provide asymmetrical protection regimes for nationals and non-nationals.[55] He also expressed concern about the use of terrorist profiles. In the wake of the terrorist attacks of 11 September 2001, authorities in one Western European country collected data on several million people. Search criteria included being of Muslim denomination or having links to specified countries with a predominately Muslim population.[56]

5. Impact on affected communities

43. The Special Rapporteur is concerned that the proliferation of xenophobic and Islamophobic rhetoric has resulted in an atmosphere of fear towards immigrants,

[50] A/HRC/6/17, para. 63.
[51] See https://perma.cc/RS5R-X42H.
[52] See https://perma.cc/NW95-XGJT.
[53] See https://perma.cc/8BSB-V7DL.
[54] See https://perma.cc/S2V7-GUMP.
[55] A/HRC/34/61, para. 33.
[56] A/HRC/4/26, para. 35.

Muslims and those perceived as Muslim. This is particularly the case in countries where Muslim identity is racialized or considered foreign. In a national security context, the rhetoric and fear contribute to the legitimization of violence and discriminatory acts of State officials. In many countries, affected groups and communities thus experience an increased incidence of racism and xenophobia, including hate crimes. Furthermore, the constant surveillance experienced by many minority and migrant communities has a chilling effect on their freedom of expression and undermines interpersonal and familiar relationships, as well as religious practice.

44. The Special Rapporteur notes that, in the absence of effective integration policies, experiences of racism and xenophobia are often accompanied by political, social and economic exclusion. This leads many minority and migrant communities to feel marginalized and alienated. A recent survey conducted in the European Union found that Muslim respondents who felt discriminated against and/or experienced harassment or violence because of their ethnic or immigrant background showed lower levels of trust in the legal system and the police, as well as a lower level of attachment to their country of residence.[57] Racially motivated hate crimes often go unreported because victims lack confidence in the ability or willingness of the police to provide them with access to justice and appropriate remedies.[58]

45. The Special Rapporteur expresses concern that the discrimination and exclusion experienced by certain groups in the context of counter-terrorism creates new grievances and escalates existing tensions between the majority and minorities in some countries. Concerns have been expressed that terrorist groups exploit such grievances in their recruiting strategies and that counter-terrorism measures may therefore have counter-productive effects. In the United Nations Global Counter-Terrorism Strategy ethnic, national and religious discrimination, political exclusion and socioeconomic marginalization are recognized as some of the factors conducive to the spread of terrorism.[59] In a preparatory report for the Strategy, it was argued that exclusion or discrimination on the basis of ethnic origin or religious belief, and the failure of many countries to integrate minorities or immigrants, create grievances that can be conducive to the recruitment of terrorist, including feelings of alienation and marginalization and an increased propensity to seek socialization in extremist groups.[60] While the Special Rapporteur agrees that such arguments are compelling, he emphasizes the need for further evidence-based research in this regard.

C. International, regional and national norms prohibiting racism and xenophobia, especially in the context of countering terrorism

46. The Special Rapporteur draws attention to the various legal and normative frameworks that have been adopted at the international, regional and national levels to curb racism and xenophobia while countering terrorism.

1. International standards

47. The Special Rapporteur recalls that the principles of equality and non-discrimination are enshrined in all core human rights treaties. While these

[57] European Union Agency for Fundamental Rights, *Second European Union Minorities and Discrimination Survey: Muslims — selected findings* (Luxembourg, Publications Office of the European Union (15 September 2017)).

[58] European Union Agency for Fundamental Rights, "European Union minorities and discrimination survey: main results" (2009), p. 135.

[59] See General Assembly resolution 60/288.

[60] A/60/825, para. 35.

treaties allow States to legitimately limit the exercise of some rights, provided that certain conditions are met, counter-terrorism measures imposing such limitations must not be discriminatory in nature. He further highlights that the principles of equality and non-discrimination have been recognized as norms of jus cogens from which no derogation is permitted, even in a state of emergency.

48. The International Convention on the Elimination of All Forms of Racial Discrimination calls for the elimination of racial discrimination in all its forms and manifestations. The Special Rapporteur considers the following provisions to be especially relevant in the context of countering terrorism: the right to security of person, the right to freedom of movement and residence, the right to leave any country and the right to nationality (art. 5 (b) and (d) (i)-(iii)).

49. The Durban Declaration and Programme of Action urge States to take measures to end xenophobia and racial discrimination against, inter alia, migrants, refugees and indigenous peoples. The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence calls upon States to take measures to eliminate hate speech and discriminatory practices based on nationality, ethnicity, religion or belief.

50. The United Nations Global Counter-Terrorism Strategy, adopted by the General Assembly in its resolution 60/288, is the first common strategic and operational framework to fight terrorism worldwide. Safeguarding the respect for human rights and the rule of law forms one of the four pillars of the Strategy. Its accompanying Plan of Action reaffirms that any measure taken to prevent and combat terrorism must comply with international law, including the Charter of the United Nations, human rights law, refugee law and international humanitarian law. The Strategy also stresses the need to address the structural conditions conducive to the spread of terrorism, including prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of the rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socioeconomic marginalization and lack of good governance.[61]

51. The Special Rapporteur welcomes the recent establishment of the United Nations Office of Counter-Terrorism to assist Member States in implementing the Strategy.[62] He is of the view that this reform provides an opportunity for better coordination and coherence of counter-terrorism efforts within the United Nations system. It also provides an opportunity for prompting a more integrated implementation of the four pillars, thus ensuring a balance between effective counter-terrorism measures and the protection and promotion of human rights.

52. The Special Rapporteur highlights that, since 2003, the General Assembly has adopted annual resolutions on the protection of human rights and fundamental freedoms while countering-terrorism. For example, in resolution 61/171 it reiterates that counter-terrorism measures should be implemented in full consideration of minority rights and must not be discriminatory on the grounds of race, colour, sex, language, religion or social origin. In resolution 63/185, it calls upon States not to resort to profiling based on stereotypes founded on grounds of discrimination, including discrimination on racial, ethnic and/or religious grounds.

53. A number of United Nations human rights mechanisms also have addressed the adverse human rights impact of counter-terrorism measures on certain groups. The Committee on the Elimination of Racial Discrimination, in its recommendation No. 30 (2004) on discrimination against non-citizens, called upon States parties to

[61] See General Assembly resolution 60/288, annex.
[62] See General Assembly resolution 71/291, para. 1.

ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping.

2. Regional standards

54. The Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (art. 14) and Protocol No. 12 thereto prohibit any kind of discrimination, while Protocol No. 4 to the Convention provides for freedom of movement (art. 2). The European Commission against Racism and Intolerance, in its general policy recommendation No. 8 (2004) on combating racism while fighting terrorism, recommends, inter alia, that States guarantee in a non-discriminatory way the freedoms of association, expression, religion and movement and ensure that no discrimination ensues from legislation and regulations or their implementation.[63] It also recommends that States ensure that their national legislation expressly includes the right not to be subject to racial discrimination among the rights from which no derogation may be made even in time of emergency.[64]

55. The African Charter on Human and Peoples' Rights provides for the right to freedom from discrimination of any kind (art. 2) and the right to freedom of movement (art. 12). In its Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa (2015), the African Commission on Human and Peoples' Rights emphasizes that terrorism must not be associated with any religion, nationality, civilization or group and that States shall ensure that counter-terrorism measures do not target individuals on a discriminatory basis, including on the grounds of race, ethnicity, colour, or national origin. Any measures taken to prevent and combat terrorism must comply with States' obligations under international human rights, humanitarian and refugee law. It also provides that States must not use combating terrorism as a pretext to unlawfully and arbitrarily restrict fundamental freedoms. When human rights abuses have occurred in the context of countering terrorism, States are obliged to ensure accountability and to provide those affected with an effective remedy and reparation.[65] Furthermore, the Protocol to the OAU Convention on the Prevention of Terrorism obliges States to outlaw the discriminatory and racist treatment of terrorist suspects (art 3.1 (k)).

56. The Organization of American States has adopted several instruments aimed at combating racism and xenophobia, including the American Convention on Human Rights and the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance. Once it has entered into force, the latter Convention obliges States parties to ensure that the adoption of measures of any kind, including those on security matters, does not discriminate directly or indirectly against persons or groups on the basis of race, colour, lineage or national or ethnic origin (art. 8).

3. National standards

57. The Special Rapporteur recalls that States have an obligation to ensure that national counter-terrorism legislation and policies and their implementation are in

[63] See European Commission against Racism and Intolerance, general policy recommendation No. 8 (2004) on combating racism while fighting terrorism, fifth recommendation to the Governments of member States.

[64] Ibid., sixth recommendation to the Governments of member States.

[65] See African Commission on Human and Peoples' Rights, "Principles and guidelines on human and peoples' rights while countering terrorism in Africa", 2015. Available from https://perma.cc/8TT6-MQ78.

compliance with international law, including human rights law, refugee law and humanitarian law. Any counter-terrorism measures must therefore comply with the principles of legality, necessity, proportionality and non-discrimination. He is pleased to note that many States have developed national standards in order to ensure that their domestic counter-terrorism frameworks comply with human right standards. Such measures include review mechanisms for draft legislation, oversight bodies and sunset clauses.[66] He has elaborated on some of these measures in the following section on good practices.

D. Good practices in combating racism, xenophobia and discrimination in the context of countering terrorism

58. The Special Rapporteur draws attention to examples of good practices that could be shared among different stakeholders and subsequently be replicated in, or adapted to, local contexts. While not exhaustive, the good practices described in the present report provide an overview of some of the legal, policy and institutional measures that have been adopted to combat racism, xenophobia and discrimination in the context of countering terrorism. The Special Rapporteur considers measures taken by various actors at different levels, including States, international and regional organizations, civil society and the private sector. It is, however, important to acknowledge that some practices may contain positive as well as some negative elements. A citation of such measures as good practices does not therefore imply an endorsement of all their aspects.

1. Non-discrimination provisions in laws and policies

59. The Special Rapporteur is pleased to note that many States have made progress in strengthening the rights to equality and non-discrimination on the grounds of race, religion, national or ethnic origin and other grounds by enshrining them in national legislation and policies.

60. The Special Rapporteur has observed that a growing number of States have codified prohibitions on racial discrimination and xenophobia — either in specific anti-discrimination legislation or included in other general legislation. States have included non-discrimination provisions in a variety of national legal instruments, including in laws incorporating the International Convention on the Elimination of All Forms of Racial Discrimination in domestic law, constitutions, criminal codes, migration and refugee laws, laws regulating the work of intelligence agencies and laws outlawing racial profiling. The Special Rapporteur welcomes such legislative initiatives and would further like to encourage States to integrate specific non-discrimination provisions into their domestic counter-terrorism laws.

61. The Special Rapporteur is pleased to note the adoption of national action plans, strategies and policies designed to combat racism and xenophobia and to promote the social integration of individuals belonging to minorities.[67] The Anti-Racial Discrimination Section of the Office of the United Nations High Commissioner for Human Rights provides States with practical guidance concerning the development and implementation of such national action plans.[68] The Special

[66] Counter-Terrorism Implementation Taskforce Working Group on Protecting Human Rights while Countering Terrorism, "Basic human rights reference guide: conformity of national counter-terrorism legislation with international human rights law" (New York, 2014), paras. 55, 61. See also A/HRC/16/51, para. 19; A/HRC/14/46, para. 13.

[67] A/HRC/26/50, para. 45; A/71/301.

[68] *Developing National Action Plans against Racial Discrimination: A Practical Guide* (United Nations publication, Sales No. E.13.XIV.3).

Rapporteur notes that a few countries have included explicit references to human rights and non-discrimination in their national policies on counter-terrorism. For example, the counter-terrorism strategy of Switzerland is aimed, inter alia, at preventing the stigmatization of minorities and discriminatory profiling practices.[69] In other countries, the principles of equality and non-discrimination have been integrated into various codes of conducts. In Mexico, the code of conduct for federal civil servants includes a non-discrimination provision.[70] In France, the code of conduct for the national police prohibits the discriminatory use of ethnicity, religion and national origin in targeting persons as suspects. The code applies to all national law enforcement officials, including those carrying out immigration and counter-terrorism functions.[71]

2. Oversight and accountability mechanisms

62. The Special Rapporteur notes with interest that some States have adopted measures designed to ensure the compliance of their domestic counter-terrorism frameworks with international human rights, refugee and humanitarian law. Such measures include the establishment of mandatory review procedures for proposed and existing counter-terrorism legislation and polices as well as the creation of oversight mechanisms for agencies involved in combating terrorism.

Review of draft legislation

63. The Special Rapporteur is pleased to note that a number of States have introduced procedures for assessing the potential human rights impact of draft legislation, including any adverse impact of counter-terrorism laws on certain groups. For example, the Attorneys General of New Zealand and Canada are required to report to Parliament where a bill appears to be inconsistent with the country's human rights obligations under domestic law.[72] Under the Human Rights Act 1998 of the United Kingdom, the Minister in charge of a bill is obliged to provide Parliament with a written statement as to the compatibility of the bill with the European Convention on Human Rights.[73] The Special Rapporteur considers such mechanisms to be important, as they ensure that the legislature is aware of the potential human rights implications when enacting or amending counter-terrorism legislation.

64. The Special Rapporteur highlights the important advisory role of national human rights institutions and equality bodies, which can lend their expertise to Governments by providing in-depth human rights impact assessments of draft counter-terrorism laws and policies.[74] The opinion of 17 March 2016 of the French Commission nationale consultative des droits de l'homme on the draft law on fighting organized crime and terrorism is a good example. In this opinion, the Commission expressed concern regarding the expansion of law enforcement powers with respect to identity checks. The Commission criticized, inter alia, the failure to include safeguards against the discriminatory application of these powers.[75]

---

[69] Switzerland, Federal Council, "Strategie der Schweiz zur Terrorismusbekämpfung" (September 2015), sect. 5.1 (in German).

[70] A/71/301, para. 77.

[71] Commission nationale de déontologie de la sécurité, saisine No. 2009.77.

[72] Canada, Department of Justice Act, sect. 4.1 (1985); New Zealand, Bill of Rights Act, sect. 7 (1990).

[73] United Kingdom of Great Britain and Northern Ireland, Human Rights Act, chap. 42, sect. 10 (1998).

[74] See Council of Europe, "National human rights structures: protecting human rights while countering terrorism", 6 December 2016. Available from https://perma.cc/TV74-629K.

[75] Légifrance, "Avis sur le projet de loi renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale", 4 June 2016.

Ongoing oversight and review

65. The Special Rapporteur learned that, in order to ensure consistency with human rights standards, some States have created oversight mechanisms tasked to review counter-terrorism legislation, practices and powers.[76] Such mechanisms can take various forms, including internal, executive, parliamentary, judicial and specialized bodies.[77] In addition, some States have included sunset clauses, which require the periodic renewal of counter-terrorism laws or certain provisions within them.[78]

66. The Special Rapporteur considers such mechanisms to be important, as they ensure ongoing review of counter-terrorism measures, thus allowing for assessment as to their legality, necessity, proportionality and effectiveness. Governments are encouraged to continuously reflect on, and make adjustment to, counter-terrorism laws and practices that are found to be inconsistent with human rights standards and the principle of non-discrimination. The review of the Anti-Terrorism Act by the Commissioner for Human Rights of Poland is one example. In 2016, the Commissioner challenged the Anti-Terrorism Act before the Constitutional Tribunal. He argued that the new legislation was inconsistent with the country's human rights obligations, inter alia, because some provisions target foreign nationals and provide asymmetrical protection regimes for Polish citizens and non-nationals.[79]

67. Moreover, oversight mechanisms ensure ongoing review of counter-terrorism powers conferred upon both State agencies and private security entities. Where discretionary powers are conferred, oversight mechanisms provide safeguards against, and accountability for, the arbitrary, unreasonable or discriminatory use of such powers against certain groups. They also help to prevent the normalization or de facto permanent existence of extraordinary powers introduced to fight terrorism.[80] The Special Rapporteur has previously addressed the important role of law enforcement oversight bodies in addressing practices such as racial and ethnic profiling. Strengthening such bodies becomes even more important as law enforcement powers are extended in the context of counter-terrorism.[81]

68. Finally, the Special Rapporteur notes that some oversight mechanisms are authorized to receive and handle individual complaints by victims of racial discrimination. For example, Denmark, Norway and Sweden have special law enforcement officers attached to the office of the Prosecutor-General who receive and investigate complaints against police officers.[82] The Special Rapporteur believes that oversight mechanisms with a complaint handling function can play a crucial role in ensuring access to justice and remedies.

69. Examples show that oversight mechanisms can make an important contribution towards combating racism, xenophobia and discrimination in a counter-

[76] European Commission for Democracy through Law (Venice Commission), "Report on counter-terrorism measures and human rights", 4 June 2010.

[77] Counter-Terrorism Implementation Taskforce Working Group on Protecting Human Rights while Countering Terrorism, "Basic human rights reference guide"; A/HRC/16/51; A/HRC/14/46.

[78] See, for example, United Kingdom, Terrorism Prevention and Investigation Measures Act, chap. 23, sect. 21 (2011); Canada, Combating Terrorism Act, *Statutes of Canada* (Bill S-7), chap. 9, clause 12 (2013); Australia, Security Legislation Amendment (Terrorism) Act, No. 65, sect. 4 (2002).

[79] See Poland, Office of the Commissioner for Human Rights, "The Commissioner for human rights challenges the Anti-Terrorism Act before the Constitutional Tribunal", 11 July 2016. Available from https://perma.cc/NHA7-J364.

[80] Counter-Terrorism Implementation Taskforce Working Group on Protecting Human Rights while Countering Terrorism, "Basic human rights reference guide"; A/HRC/16/51; A/HRC/14/46.

[81] See, in particular, A/71/301; A/HRC/29/46.

[82] A/HRC/29/46, paras. 52-54; A/71/301, para. 66.

terrorism context. However, the Special Rapporteur recalls that the extent of this contribution depends on a variety of factors, including the mandate and statutory powers of relevant mechanisms, the availability of adequate resources and the existence of independent civilian mechanisms within multilevel systems of oversight.[83]

Role of the judiciary

70. The Special Rapporteur wishes to underline the central role of judicial review in combating racism, xenophobia and discrimination in the context of countering terrorism. He is pleased to note that many States empower the courts to strike down any laws that are incompatible with human rights standards, or to adopt an interpretation of the legislation that is in compliance with international human rights law.[84]

71. In some countries, the judiciary has used these powers to review counter-terrorism legislation or provisions. For example, the High Court of Kenya prevented the planned closure of a refugee camp allegedly for reasons of national security. The Court held that a closure would be illegal and discriminatory as it targeted refugees of one particular ethnic minority.[85] In 2015, the country's High Court also struck down proposed amendments to its anti-terrorism legislation.[86]

72. Since the introduction of the state of emergency, the French courts have played an important role in contesting house arrest measures against individuals deemed to be a threat to national security. This is particularly important as these administrative measures do not require prior judicial authorization and have reportedly been used disproportionately against Muslims and other minorities.[87] French courts may also be key in reviewing plans to normalize emergency powers by codifying them in normal criminal and administrative law.[88]

73. The judiciary in the United States of America was instrumental in temporarily suspending an executive order which planned to ban nationals of seven Muslim-majority countries from entering the country. Following legal proceedings in several State entities, the country's Supreme Court has recently allowed a modified order to enter into effect. However, the Court imposed significant limitations and will hear arguments on the case later in 2017.[89]

74. Similarly, a recent Supreme Court ruling in the United Kingdom strengthened the procedural rights regarding out-of-country deportation appeals. The Court clarified that those affected must be granted the right to appeal in a domestic court before being deported. While the case concerned foreign criminals, the reasoning applies equally to anyone being deported or removed, including terrorist suspects affected by nationality-stripping measures.[90]

---

[83] Counter-Terrorism Implementation Taskforce Working Group on Protecting Human Rights while Countering Terrorism, "Basic human rights reference guide"; A/HRC/16/51; A/HRC/14/46.

[84] Counter-Terrorism Implementation Taskforce Working Group on Protecting Human Rights while Countering Terrorism, "Basic human rights reference guide", para. 57; A/HRC/16/51.

[85] See https://perma.cc/6775-C3CM.

[86] See Peter Kagwanja, "Ruling on anti-terrorism law a triumph for Kenya's judiciary", Daily Nation, 28 February 2015. Available from https://perma.cc/JK7E-WFCZ.

[87] See, for example, https://goo.gl/YT71yK.

[88] Human Rights Watch, "France: don't 'normalize' emergency powers".

[89] Sabrina Siddiqui, "Why the Supreme Court's travel ban ruling may not be a win for Trump", *The Guardian*, 26 June 2017.

[90] United Kingdom, Supreme Court, *Kiarie and Byndloss, R (on the applications of) v. Secretary of State for the Home Department*, [2017] UKSC 42, Judgment of 14 June 2017.

75. In Germany, the judiciary has contributed to a shift in the approach towards far-right violence. In the past, public authorities and the judiciary had failed to consider organized attacks against refugees, including bombings and arson attacks against refugee shelters, as terrorism. The recent trial against the so-called Freital group was the first time that members of a right-wing extremist group have been tried for terrorism.[91]

3. Collection of disaggregated data

76. The Special Rapporteur reiterates the importance of systematically recording, collecting and publishing disaggregated data on racial and xenophobic discrimination, hate speech and hate crimes.[92] He is pleased to note that some States have developed data collection systems on hate crimes, including crimes committed against individuals on the grounds of race, colour, ethnicity, origin or minority status, citizenship and religion. He was informed that some States collect data specifically on racist crimes committed by members of extremist groups. He welcomes these initiatives. He also highlights that, in the absence of official statistics in some States, national human rights institutions and non-governmental organizations play a central role in collecting disaggregated data on hate crimes.[93] In Greece, the Racist Violence Recording Network documents racist incidents and analyses the quantitative and qualitative trends relating to racist violence in the country. Stakeholders respect the principle of confidentiality and incidents are reported to the network without any reference to personal data.[94] The Network also issues recommendations to the Government and assists relevant authorities with their implementation. While noting various gaps and areas of improvement, the Network expressed general satisfaction over the Greek authorities' response to its recommendations. For example, the Government followed recommendations to appoint special prosecutors on racist crimes in several cities — a good practice identified by the Network on the basis of the data that it had collected.[95]

77. In the context of counter-terrorism, the Special Rapporteur recalls the importance of disaggregated data collection. Data enables States to assess the effectiveness of counter-terrorism legislation and policies and their impact on certain groups. It can, for example, detect laws or practices that focus disproportionate attention on racial and ethnic minorities on the basis of stereotypes linking them with crime and terrorism. On the basis of this knowledge, States can design targeted measures aimed at addressing the negative human rights implications of counter-terrorism measures. Data also allows the effectiveness of such interventions to be evaluated. Furthermore, data serves as a tool to increase transparency and accountability of actors with counter-terrorism powers. This is particularly important as many States have provided law-enforcement agencies and local authorities with extensive discretionary powers regarding identity checks, stops and searches and the use of administrative measures. Finally, data gives a voice and face to victims and therefore improves their access to justice and remedies.

78. The Special Rapporteur appreciates that some States systematically gather disaggregated data on law enforcement practices. In some countries, this has led to

[91] See Ben Knight, "Terror trial in Dresden for Freital neo-Nazi group", Deutsche Welle, 6 March 2017. Available from https://perma.cc/4WGA-CYEE; European Civil War, "What is the 'German right-wing terrorist' 'Freital Group'? And what can it teach us about processing resistance", available from https://perma.cc/87M8-HCSN.

[92] See, in particular, A/70/335.

[93] A/HRC/26/50, para. 46.

[94] A/HRC/32/50/Add.1, paras. 35-38.

[95] Racist Violence Recording Network, "Annual report 2016", pp. 17-19.

informed changes in policing practices, making law enforcement officials more professional in their conduct towards racial and ethnic minorities as well as the general population. For example, British law obliges the police in England and Wales to record ethnically disaggregated data on stop-and-search practices. Police forces in some countries are required to issue receipts to persons who have been stopped, which include details of the reason for the stop and the identity both of the person concerned and of the police officer.[96] The municipality of Fuenlabrada, Spain, has developed a similar initiative with the support of the European Commission.[97] The Special Rapporteur encourages such initiatives as they are key in eliminating racial profiling and in improving trust in the police within minority communities. Forms recording police encounters could also provide victims of racial profiling with evidence to be used when seeking remedy. The Special Rapporteur also learned that the Legal Aid Society of New York City launched the "Cop Accountability Program", a database containing information about wrongdoing by local police officers. The database was set up to help public defenders in court hearings regarding the misconduct of police officials. Using such information to monitor the performance of law enforcement agents can reduce their individual discretionary powers by obliging them to rely on objective indicators of suspicion rather than on subjective factors when deciding whom to stop. This good practice has been shown to lead to increased police efficiency.[98]

4. Training

79. Various United Nations human rights mechanisms have emphasized the importance of human rights education and training on non-discrimination for law enforcement and other relevant officials involved in combating terrorism.[99] The Special Rapporteur is therefore pleased to note that many States have intensified and expanded such training activities, which encompass general training, training on racist and xenophobic hate speech and crimes and training on specific counter-terrorism practices.

80. In Mexico, the Instituto Nelson Mandela was created to carry out training on equality and non-discrimination for the general public and civil servants.[100] Other countries have introduced diversity and cultural sensitivity trainings in various parts of the public sector.[101] Greece issued recommendations to combat rising racist and xenophobic violence, including through improved training of the police and the judiciary on racist crimes.[102] Similarly, Spain has developed a training project aimed at educating local police and security forces on identifying racist and xenophobic incidents.[103]

81. The Special Rapporteur was also made aware of different examples of training undertaken by law enforcement agencies to eliminate racial and ethnic profiling carried out by their staff. The federal criminal investigation department of Belgium has two experts on Islam, who provide advice and training to police officers with counter-terrorism responsibilities and encourage them not to rely on stereotypes or

[96] A/HRC/29/46, para. 62.
[97] Ibid.
[98] Ibid.
[99] See, for example, CERD/C/CHL/CO/19-21, para. 14; Committee on the Elimination of Racial Discrimination, general recommendation No. 13 (1993) on the training of law enforcement officials in the protection of human rights; A/64/211, para. 53 (j); A/HRC/35/41/Add.1, para. 112; A/HRC/23/56/Add.2, para. 84; A/HRC/23/56/Add.1, para. 84; A/HRC/32/50/Add.1, para. 71.
[100] A/71/301, para. 77.
[101] A/HRC/29/46, paras. 56-57.
[102] A/HRC/32/50/Add.1, para. 21.
[103] A/HRC/23/56/Add.2, para. 24.

profiling.[104] With regard to training for law enforcement, the Special Rapporteur found that practical training linked to specific powers, actions and activities of law enforcement is the most effective.[105]

82. The Special Rapporteur acknowledges that discriminatory anti-terrorism practices cannot be eradicated by training measures alone. Nevertheless, training for law enforcement personnel can make a significant contribution to combating racism and xenophobia in a counter-terrorism context. Training helps to educate relevant actors on anti-discrimination law and unconscious biases, to raise awareness on the prevalence and consequences of discrimination and to identify methods for increasing trust between various stakeholders.[106] As a wide variety of stakeholders are involved in the fight against terrorism, training should target those actors at the national and local levels (e.g. members of the judiciary and public prosecutors; police forces, intelligence services and security personnel; border control and immigration officials; teachers, journalists, internet service providers and social media platforms).

5. Education and awareness-raising

83. The Special Rapporteur reiterates the crucial role of education in deconstructing prejudices and stereotypes, promoting tolerance, understanding and diversity and creating new values and attitudes. It therefore plays an important role in countering the negative influence of populist movements and the anti-Muslim and anti-immigrant rhetoric these promote. In many countries, such rhetoric leads to the association of certain groups with terrorism and consequently manifests in increased experiences of racism and xenophobia.

84. The Special Rapporteur is pleased to note that some States have recognized the importance of education and awareness-raising initiatives for the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance. In Argentina, the large influx of Syrian refugees and the fears of a terrorist attack have fuelled Islamophobia. To counter these sentiments, the country has prepared an awareness-raising and training plan for all schools. The plan aims to combat ignorance and prejudice towards Muslims by educating students about the history of Islam and Muslim beliefs, thus elucidating the prejudices linking Muslims and Arabs with terrorism.[107] Other good practices include public campaigns and awareness-raising activities designed to foster tolerance and respect for cultural diversity. These include the organization of cultural events, forums and seminars and the publication of literature. The Special Rapporteur encourages such initiatives as these provide space for intercultural dialogue and interaction.

85. Finally, the Special Rapporteur recalls that the media has a fundamental role to play in educating the public, promoting tolerance and combating hate speech. The recommendations made in his 2014 report to the Human Rights Council, in which he addressed the challenges of racism and hate speech on the internet and social media, can serve as examples of good practices to be followed.[108] The Argentinian Media Ombudsperson is another example of good practice identified by the Special Rapporteur. The Ombudsperson is mandated, inter alia, to conduct research on the role played by the media in stigmatizing certain populations and fostering

[104] Rachel Neild, *Reducing Ethnic Profiling in the European Union: A Handbook of Good Practices* (New York, Open Society Foundations, 2012), p. 133.

[105] A/HRC/29/46, para. 71.

[106] European Union Agency for Fundamental Rights, *Fundamental Rights Report 2017*, p. 9.

[107] See Alan Soria Guadalupe, "Capacitarán a alumnos para que entiendan de qué se trata el islam", *La Nación*, 13 September 2016. Available from https://perma.cc/3ZB9-C6GF.

[108] A/HRC/26/49.

xenophobia among the public. The Special Rapporteur welcomes this good practice and encourages the media and journalists to work with the Ombudsperson to develop voluntary ethical codes of conduct and self-regulatory measures, policies and practices to combat racism. He also encourages States to ensure diversity of voices through incentives and support to community media providing visibility and voice to victims of racism.[109]

III. Conclusions and recommendations

86. The upsurge in terrorist attacks in recent times has prompted States in various regions of the world to adopt a variety of counter-terrorism measures. While the Special Rapporteur acknowledges the necessity for States to take measures to combat terrorism, he nonetheless expresses his concern that certain groups are disproportionately affected by counter-terrorism measures. Such measures are not only contrary to the principle of non-discrimination, but also prevent affected communities from fully enjoying a wide variety of other human rights.

87. The Special Rapporteur recalls that, in line with General Assembly resolution 60/288 on the United Nations Global Counter-Terrorism Strategy, the prevention of racism, racial discrimination, xenophobia and related intolerance should be an integral part of any strategy to prevent and fight against terrorism. In this regard, he also recalls general recommendation No. 30 (2004) on discrimination against non-citizens of the Committee on the Elimination of Racial Discrimination, according to which States parties must ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin. The Special Rapporteur recommends that States incorporate concrete measures and adequate mechanisms to prevent racism and xenophobia into their national counter-terrorism frameworks. Such measures include non-discrimination provisions in relevant legal and policy documents as well as the establishment of appropriate oversight mechanisms tasked to review counter-terrorism legislation, practices and powers.

88. The Special Rapporteur reiterates that the systematic collection of disaggregated data is particularly important in the context of counter-terrorism. He recommends the collection of disaggregated data and statistics on the number of cases of racism and xenophobia reported to the authorities, including the percentage of investigations and prosecutions undertaken following such complaints and their outcome. He also recommends that States collect data on law enforcement practices and the use of administrative measures. In that regard, he encourages States to promote the implementation of good practices, such as the use of registration forms for the police to record all identity checks or house searches. Such forms could provide the victims of racial profiling with a record of their encounter with the police that could be used as proof when seeking remedy.

89. Furthermore, the Special Rapporteur recommends that States ensure adequate resources for human rights and non-discrimination training for all relevant officials involved in combating terrorism. He emphasizes that training efforts need to be accompanied by comprehensive education and awareness-raising initiatives. In particular, the Special Rapporteur calls for sustained public campaigns and initiatives to be undertaken to change the social

[109] A/HRC/35/41/Add.1, paras. 80-81 and 114-116.

perception and public attitude towards Muslims, migrants, asylum seekers and refugees. The media, political and religious leaders play an important role in combating hate speech and stereotypes. In this regard, the Special Rapporteur recommends that the highest levels of government and the leadership of all political parties adopt clear, strong and unequivocal positions against racism and racial discrimination. Similarly, the media must refrain from xenophobic stereotyping, scapegoating and racist remarks. Such acts should be duly investigated and prosecuted and the media and journalists should adopt a code of good conduct containing provisions against racism and xenophobia.

90. **As the present report is the last submitted by the current mandate holder, the Special Rapporteur would like to thank the members of the General Assembly for the privilege and opportunities that he has had to engage with them and to serve in this capacity.**